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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re JUBILEE COTTON MILLS, LIMITED.

[00142 of 1921.]

C. A.
1922
March 27, 28, 29, 30; *April* 3, 4; *July* 28.

Company—Promoter—Secret Profits—Shares and Debentures—Allotment before filing Statement in Lieu of Prospectus—Validity—Certificate of Incorporation—Conclusiveness as to Date—Worthless Shares—Realization—Profits obtained by fraudulent Unloading—Promoter's Liability to Account—Measure of Damages—Companies (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 15, 16, 17, 82, *sub-s.* 1.

A company was incorporated in 1920 having for its object the acquisition and carrying on of a cotton mill. The memorandum and articles of association of the company were accepted and retained by the registrar on January 6, 1920, but the certificate, though purporting to be dated on that day, was not in fact signed by the registrar until January 8, 1920. On January 6, 1920, the company, before filing any statement in lieu of prospectus as required by s. 82 of the Companies (Consolidation) Act, 1908, proceeded to allot a large number of fully paid shares and debentures to the vendor as the ostensible consideration for the purchase. This consideration was, without the company's knowledge, overstated in the purchase agreement adopted by the memorandum and articles. A large number of these shares and debentures were transferred to the promoters of the company. The debentures were worth about 90 per cent. of their face value, the shares were absolutely worthless. The promoters however not only realized the debentures at their proper market value, but by means of fraudulent unloading obtained a considerable sum for the worthless shares.

The company was subsequently ordered to be wound up compulsorily, and on a misfeasance summons taken out by the official receiver as liquidator, against L. and D. the alleged promoters, Astbury J. (inter alia) ordered L. to pay to the liquidator a sum of 35,390*l.* in respect of secret profits alleged to have been made by him as promoter. On appeal by L. :—

Held, upon the facts by Lord Sterndale M.R. and Warrington L.J., Younger L.J. dissenting, that L. was a promoter of the company.

Held, also, by Lord Sterndale M.R., that L. being a promoter and as such being in a fiduciary position, even assuming that the allotment of shares and debentures to him on January 6, 1920, was void by reason of their having been allotted before a statement in lieu of prospectus had been filed as required by s. 82 of the Act, 1908, he was put by the company in control of something out of which he made a profit, and that whatever it was, valid or invalid, he held it from his position of promoter on behalf of the company, and could not when called upon to account for the profit justify himself in keeping that profit by saying that the company had no legal justification for bringing something into existence and entrusting it to him.

Held, by Warrington L.J., agreeing on this point with Younger L.J., that the allotment of the shares and debentures was illegal and void on the ground that it took place before the company had filed a statement in lieu of prospectus as required by s. 82.

Dicta in *In re Blair Open Hearth Furnace Co.* [1914] 1 Ch. 390, 400, 409, 412 approved and applied.

Held, therefore (by Warrington L.J.), that there was nothing for which the liquidator could require L. to account.

Held, further, by Lord Sterndale M.R. and Warrington L.J., Younger L.J. expressing no concluded opinion on the point, that the effect of ss. 15, 16, 17 of the Act of 1908 taken together was that the registration of the company took place when the articles of association were accepted and retained by the registrar, and that the certificate correctly stated the date, but that even if that were not so, then under s. 17 of the Act, the certificate was conclusive evidence, amongst other things, that the registration and incorporation of the company were duly effected on the day mentioned in the certificate and must have effect accordingly. The material date was that mentioned in the certificate, and not that on which the signature thereto was written.

Held, also, that the effect of s. 16 was that the date mentioned in the certificate was the first day of the company's corporate existence, and that it was not open to any one to prove the moment of time on that day on which a corporate act was done and then to say that the company had not then been incorporated. The corporate person was to be treated as having been in existence for the whole day of incorporation.

Observations on the measure of damages in the case of shares allotted to a promoter by way of secret profit.

Decision of Astbury J. [1922] 1 Ch. 100 reversed.

APPEAL from the decision of Astbury J. (1)

On January 6, 1920, the above-named company was registered with a capital of 150,000 1*l.* shares. The facts relating to the promotion and incorporation of the company are, for the purposes of this report, fully stated in the report of the case in the Court below and in the judgment of the Court of Appeal.

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(1) [1922] 1 Ch. 100.

On March 15, 1921, a compulsory winding-up order was made on a contributory's petition.

On March 23, 1921, the official receiver as liquidator issued a summons against Lewis and Demery for a declaration that they were promoters on and after December 4, 1919, and accountable for their profits on the purchase and resale of the Jubilee Cotton Mills, and also liable to damages, on the ground that they concealed their promotion profits and that the sale to the company was at a grossly excessive price and a fraud on the company.

He also issued a summons against the two Fletchers and Demery and Macdonald for damages for their negligence as directors (inter alia) in relation to the purchase and in relation to the concealment of the promotion profits.

He also issued a summons against Fletcher and Thomas Isherwood & Co. for a declaration that the debentures were invalid on the ground that they formed part of the concealed promotion profits, that Fletcher had given no consideration for them, and that their issue was invalid under s. 82.

Lewis's main defence was that he was not a promoter of the company actually formed, as he merely arranged to promote a private company in which Demery, Fletcher and himself or their nominees should have all the shares. He also said that the sale of his potential holding on December 29, 1919, was an implied revocation of Demery's authority, and that in any case Demery had exceeded his authority. He also said that he was only present at the meeting of January 6, 1920, for about fifteen minutes, and took no part in it beyond signing cheques of 5000*l.* and 10,000*l.* for Wallis. These points failed on the evidence.

Lewis and Demery also contended that having regard to s. 82 of the Companies (Consolidation) Act, 1908, the shares and debentures purported to be issued were invalid, so that the official receiver could not base any claim thereon. They also contended that in any case the official receiver could not claim profits that he himself alleged were merely obtained by fraudulent unloading of the shares, and which apart from that fraudulent unloading would never have come into existence.

The two first summonses were heard together and judgment was reserved.

The third summons was then heard and ultimately compromised.

On November 28, 1921, Astbury J. made the following order: 1. A declaration on the first summons that the shares and debentures in question were received by Lewis and Demery by way of secret profit and in fraud of the company, and that Lewis as a promoter, and Demery as a promoter and director, are liable to account for and pay to the liquidator the amount of all moneys or money's worth severally received by them respectively by means of the realization and sale of the same, subject to all disbursements, if any, properly made by them respectively in obtaining and realizing such shares and debentures. 2. Judgment against Lewis for 35,390*l.* 3. An account of all moneys or money's worth received by Demery on the sale or realization of the 20,000 shares received by him as aforesaid, and an order that he do pay to the liquidator the amount, if any, found due from him on the taking of this account after crediting him with the sum of 826*l.* 11*s.* The costs of taking this account to be reserved. 4. An order that Lewis and Demery do jointly and severally pay to the liquidator his costs of the first summons down to and including the date of this order. 5. No order on the second summons against the directors, except that they do pay their own costs thereof respectively. 6. The liquidator's costs of both summonses, except so far as the same are obtained by him under this order, to be his costs in the liquidation. 7. One order on the two summonses.

Lewis appealed. The appeal was heard on March 27, 28, 29, 30; April 3, 4, 1922.

During the argument a statement was admitted from the registrar of companies to the effect that the papers leading to the registration of the company were lodged at the Companies Registration Office and the requisite fees paid on January 6, 1920, that the papers were examined and found to be in proper form and they were accordingly accepted and the certificate of incorporation was on January 8, 1920, signed by the registrar (dated January 6) and handed to the promoters' solicitors on the same day. This course was stated to be in accordance with the established practice in the office of the registrar of companies.

Tomlin K.C. and *R. Fortune* for the appellant. It is submitted upon the evidence that the appellant was not a promoter of the company at all but was the victim of a fraud. The company he agreed on December 4, 1919, to promote was not in fact the company that was incorporated on January 6, 1920. In order to establish a case of secret profit it must be shown (1.) that the person sought to be charged is a promoter and (2.) that the profit is a secret profit: *In re British Seamless Paper Box Co.* (1); Buckley on Companies, 9th ed., p. 188. It is essential to the liquidator's case that he should establish that the appellant was on December 4 a promoter of the company which was incorporated on January 6, 1920, and this he has not done.

No one has suggested that the appellant himself made any fraudulent representations, but he has nevertheless been held liable for the fraudulent representations of others.

[They also referred to *In re Ambrose Lake Tin and Copper Mining Co.* (2); *In re New Mashonaland Exploration Co.* (3); *In re Rica Gold Washing Co.* (4)]

But assuming that the appellant was a promoter, it is submitted that there was nothing for which he could be called upon to account to the company. The shares allotted to him were worthless and the company cannot therefore make him liable for the purchase money for them

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(1) (1881) 17 Ch. D. 467.
(2) (1880) 14 Ch. D. 390.
(3) [1892] 3 Ch. 577.
(4) (1879) 11 Ch. D. 36.

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that it could not honestly have obtained. No doubt the appellant is exposed to the risk of being called upon by the purchasers of shares from him to refund the money paid for them.

Further the appellant has two legal defences to the liquidator's application. The first is that the allotment of the shares and debentures was made at a time when the company was not in existence. The allotment was made on January 6, 1920, and the certificate of incorporation, although purporting to be made on that date, was not in fact signed by the registrar until January 8.

[WARRINGTON L.J. referred to s. 16, sub-s. 2, of the Companies (Consolidation) Act, 1908. (1)]

The registrar had no jurisdiction to date back the certificate to January 6.

[WARRINGTON L.J. Can the Court go behind the certificate ?]

Yes, except so far as it is precluded from doing so by the express words of the section. The question of fact here is not whether the certificate is conclusive but whether on a certain day on which certain transactions took place there was in fact a company in existence. Sect. 16 is only applicable where the registrar has performed his statutory duty. It cannot be seriously contended that where in fact there was no company in existence the Court is to assume that there was one. The section is not directed to determining an outside question of fact whether on a certain date there was in fact a company in esse.

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(1) Companies (Consolidation) Act, 1908, s. 15 : "The memorandum and the articles (if any) shall be delivered to the registrar of companies for that part of the United Kingdom in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them."

Sect. 16, sub-s. 1 : "On the registration of the memorandum of a company the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited."

Sub-s. 2 : "From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act."

Sect. 17, sub-s. 1 : "A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act."

[WARRINGTON L.J. We shall have to consider carefully *Peel's Case.* (1)]

The relevancy of the present point is that if the shares were not validly allotted the appellant cannot be made liable in respect of them.

The second defence is that the shares and debentures were allotted before the company had filed a statement in lieu of prospectus as required by s. 82 of the Act of 1908. (2) Under that section it is illegal for a company, not issuing a prospectus, to go to allotment unless a statement in lieu of prospectus has previously been filed. The section is an absolute prohibition and any allotment in disregard of it is void.

[YOUNGER L.J. Is an allotment of fully paid shares to a vendor within the prohibition?]

An allotment made before the filing of the statement required by s. 82 cannot be good. It may well be that the section does not apply to an allotment of shares to the subscribers of the memorandum.

[WARRINGTON L.J. That is a pure formality.]

Yes. See s. 24.

The appellant cannot be a trustee for the company of the proceeds of his iniquity.

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(1) (1867) L. R. 2 Ch. 674.

(2) Companies (Consolidation) Act, 1908, s. 82, sub-s. 1: "A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Second Schedule to this Act."

[LORD STERNDALE M.R. Has he not in his pocket something which ought really to go to the company ?]

It is money which the company could never have obtained by any legitimate means.

In re Blair Open Hearth Furnace Co. (1) was a case of the filing of an inaccurate statement, and it was held that an allotment was not vitiated by the want of accuracy in the statement. Four judges then took the view that the non-filing of a statement under s. 82 makes any allotment invalid. There is a distinction between contract and allotment. Contract is executory but allotment is completion. Until the filing of the statement there cannot be any valid allotment. The fact that the appellant has sold invalid shares does not give the company a right to claim any secret profit that he has made in respect of them. Sect. 87, sub-s. 1 (*d*), imposes restrictions on the commencement of the business or the exercise of borrowing powers, unless, in the case of a company which does not issue a prospectus, a statement in lieu of prospectus has been filed with the registrar.

The company cannot set up their own estoppel for the purpose of fixing the appellant with liability.

Hastings K.C. and *Wallington* for the liquidator. It is submitted that the certificate of incorporation is conclusive that the company was incorporated on January 6, 1920. There is no evidence that it was not signed as soon as the registrar's office was opened on January 6. The Court will assume that the registration took place at the earliest period on that day: *Wright* v. *Mills* (2); *Edwards* v. *The Queen.* (3)

[YOUNGER L.J. The certificate appears to have been signed on January 8.]

This will be a far-reaching decision if it be held that the certificate is not conclusive as to the date of incorporation.

[WARRINGTON L.J. The only case I know of in which the point has been considered is *Peel's Case.* (4)]

The company would be estopped from denying as against persons who had paid money for their shares that the company was properly registered.

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(1) [1914] 1 Ch. 390.
(2) (1859) 4 H. & N. 488.
(3) (1854) 9 Ex. 628.
(4) (1867) L. R. 2 Ch. 674.

[YOUNGER L.J. In *Burkinshaw* v. *Nicolls* (1) the person who set up the estoppel was the registered transferee of the shares.]

Estoppel applies even in the case of an illegal allotment of debentures: *Webb* v. *Herne Bay Commissioners.* (2)

[YOUNGER L.J. In that case the allotment of the debentures was not ultra vires. See also *Baroness Wenlock* v. *River Dee Co.* (3)]

Here we know nothing of the facts with regard to the shares in question, whether these were registered and in whose name they are.

What the liquidator here complains of is that the appellant has made a profit out of the company's property. He has obtained something from the company, whether it be shares or pieces of paper, out of which he has made a profit for himself and for which he ought to account to the company.

The effect of an allotment in contravention of s. 82 is a casus omissus. An allotment made to an applicant in contravention of the provision of s. 85 is voidable at the instance of the applicant and it is submitted it is equally so under s. 82. There is no suggestion in s. 82 that the allotment is to be void. In any case the company could not be heard to say that the shares in question had been improperly allotted. If the allotment is to be treated as absolutely void the company might, in the case of an innocent purchaser who had paid money for his shares, keep the money and say that the issue of the shares was illegal. The liquidator here is really appearing on behalf of shareholders who have paid for their shares. The company would be estopped from setting up their own illegality against persons who had paid money for their shares.

The provisions of the Act of 1908 as to the illegality in the issue of shares were intended for the protection of shareholders, not of companies: *Lodge* v. *National Union*

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(1) (1878) 3 App. Cas. 1004.

(2) (1870) L. R. 5 Q. B. 642.

(3) (1885) 10 App. Cas. 354.

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Investment Co. (1); *In re Suarez* (2); *Kearley* v. *Thomson* (3); Maxwell on the Interpretation of Statutes, 6th ed., p. 369. The company cannot therefore take advantage of these provisions.

Tomlin K.C. in reply. As regards the conclusiveness of the certificate, it is submitted that the Court, with the knowledge that it now has of the practice of the registrar's office, will hold that on January 6 when the shares were allotted the company was not in fact incorporated. The certificate was signed by the registrar on January 8 and dated back by him to January 6. But even if the company must be taken to have been incorporated on January 6 it is submitted that the appellant is entitled to prove that at the particular hour when the shares in question were allotted the company was not then in existence: *Clarke* v. *Bradlaugh.* (4) There is no provision in s. 17 which precludes a person from showing that at a particular hour there was no company in existence. In *Campbell* v. *Strangeways* (5) it was held that a licence operated only from the time when it was granted and did not relate back so as to cover an offence committed at an earlier hour on the same day. The question whether the company was in existence at the time of the allotment is one of fact and the only question is whether there is anything in the Act which prevents that fact being ascertained. The words of s. 16, sub-s. 2, are: "From the date of incorporation mentioned in the certificate," that is, in this case, January 8, and therefore the company was not in existence on January 6. Estoppel is an instrument of defence and not of offence. It is a right which arises out of the relation which exists between the parties.

As regards s. 82 it is submitted that the matter is concluded by *In re Blair Open Hearth Furnace Co.* (6) It is clear that the language of s. 86, sub-s. 1, is confined to "the last foregoing section" and would not be appropriate to include s. 82.

Cur. adv. vult.

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(1) [1907] 1 Ch. 300, 306.
(2) [1918] 1 Ch. 176, 199.
(3) (1890) 24 Q. B. D. 742, 745.
(4) (1881) 7 Q. B. D. 151.
(5) (1877) 3 C. P. D. 105.
(6) [1914] 1 Ch. 390.

July 28. The following written judgments were delivered :—

LORD STERNDALE M.R. This is an appeal from a decision of Astbury J. holding the appellant, Mr. Lewis, responsible to the liquidator of the Jubilee Cotton Mills, Ld., for secret profits made by him as a promoter of that company. The appellant questions that judgment upon grounds both of fact and law. He denies that he was a promoter of the company and also contends that if he were a promoter he was not liable on certain legal grounds, to which I shall refer later.

The facts relating to the promotion and the business of the company are very complicated, and involve a long history of fraud in connection with which several of the persons whose names occur in the history of the case have been convicted at the Central Criminal Court and sentenced to various terms of imprisonment. It is, however, fair to say at the outset that no fraud has ever been established against the appellant; no criminal charge has ever been made against him, and in the only civil proceedings of which I know in which accusations of fraudulent conduct were made against him they were held by Russell J., who tried the case, to be disproved. For the sake of brevity I do not propose to set out all the facts in detail. Subject to the reservation as to findings of fact I am content to take them as set out in pp. 1 to 28 of the shorthand notes of the judgment of Astbury J. I shall deal with those two matters later on. I am also content to take the summary of them as stated in the judgment of Warrington L.J., which I have had the opportunity of reading. It is as follows: "The scheme to which early in December, 1919, Lewis became a party was that a company should be formed with a capital of 150,000*l.* divided into shares of 1*l.* each, with a power to create and issue debentures to be exercised in the first instance by the creation and issue of debentures for 30,000*l.* That this company should purchase the freehold of the mills and the other property referred to for 180,000*l.* to be satisfied by the issue of debentures for 30,000*l.* and the allotment of fully paid shares for 150,000*l.* That Lewis should provide 30,000*l.* in two instalments of 15,000*l.* in cash, as security for which he should receive the debentures for 30,000*l.* That he should also receive 95,000 fully paid up shares of 1*l.* each, of which 20,000 were to go to Demery, leaving 75,000 at his own disposal. The remaining 55,000 shares were to go to the owner of the mill, and other property. It was further arranged that Demery was to carry out the details of the promotion and formation of the company, acting therein as the agent of Lewis." I may add to this statement that money for the promotion of the company was found by Lewis but was afterwards repaid to him, and that on December 29, 1919, Lewis had sold all his interest in the shares to Hooley.

So stated the case of promotion by Lewis would seem to be clear, but it was strongly contended on his behalf that although he intended to promote a company it was not this company. He contended that the only company contemplated by him and the only company which he gave Demery authority to promote was one in which he, Fletcher and Demery were to be the only shareholders, and one whose object should be to carry out the transaction of selling on his behalf to the company the mill, etc., which he had bought from Fletcher. I do not think the evidence supports these contentions. It may be, though I have great doubt as to whether I should accept his statement to that effect, that in his own mind at first he thought that he and the two others named would be the only shareholders, but he never limited Demery's authority to such a company. I asked during the argument for any evidence showing such a limitation of Demery's authority, and none satisfactory, at any rate to my mind, was produced. When the company was formed no conveyance or transfer of the property from him took place and the shares which he obtained were transferred to him by blank transfers executed by Fletcher. He was not a director and did not take any part in allotting the shares, and when he did know, after the registration of the company, as he must have known at some time even on his own case, that there were other persons concerned in the company, he made no remonstrance. In addition, before the registration, he knew at a very early stage that other persons, that is to say Hooley and his associates, were concerned in the matter and taking part in procuring the formation of the company, and he never placed any limitation or restriction upon Demery's authority to act for him in its promotion. The learned counsel for the appellant said that Lewis experienced what he called a change of mentality, unappreciated by the learned judge, after he had sold his shares, that is to say, that up to that time he had contemplated promoting a company, but that afterwards he thought he had nothing more to do with it, and that it was entirely in the hands of Demery, Hooley and the others. I cannot accept this contention. It was essential for the carrying out of his plan that a company which would issue shares to him should be formed. He had given Demery authority without expressing any limitation on that authority to promote a company for him, and he never revoked or qualified that authority, or, as I have already pointed out, expressed any dissatisfaction when he knew what had been done. The only change of mentality of which I can see any indication is that perhaps he thought that after the sale of his shares he need not personally take so much trouble about the matter, but could leave the work to be done by his agent, Demery.

In expressing my conclusion upon the evidence in this case I think I cannot do better than adopt the language of Russell J. in the case to which I have already alluded of *Marple* v. *Hooley* [1920. M. 2915]. (1) He says this at p. 16 of the transcript of the shorthand notes, speaking of the promotion: "Mr. Lewis in the box quite candidly said that the whole matter was, for him, a pure gamble. He was promoting the company, through Demery, providing the money for the promotion, taking a debenture to cover the 30,000*l.*, and hoping to make a profit out of the public by selling his shares. There was no disguise about it: that is what he intended to do. He left everything to Demery. He took no interest in the details of the promotion at all; he did not care a rap whether the price to be paid by the company for the property was excessive, as it was; he did not care a rap whether the company was to be over-capitalised, as it was. He never inquired who the directors of the company were or were to be, who were to conduct the company's affairs. In fact, all he cared about was to get his debentures and shares, and out of them to realize a profit. That was his position, as he quite candidly admitted." Of course I do not adopt this as a finding in this case, for it proceeded upon other evidence in another case, but it aptly expresses the conclusion to which I have come upon the evidence before me.

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(1) Unreported.

In my opinion therefore the appeal fails on this question of fact, and Lewis was a promoter of this company and so in a fiduciary position.

I may now allude to the two findings of fact as to which I made a reservation in accepting the statements in the judgment of Astbury J. The first is this, on p. 11 of the transcript of the shorthand notes: "Shortly after this Lewis and Demery signed the draft memorandum and articles of the proposed company, the document in its final form being subsequently signed by seven signatories for one share each, to the knowledge of both of them." I do not think the evidence establishes that Lewis in fact knew what was in the final form of the memorandum and articles of association, at any rate till after the registration of the company, but it does establish that he had every opportunity of knowing exactly what they were and that if he did not in fact know their contents it was only because he did not care what shape they took under Demery's direction so long as he got his shares.

The other matter is as to Lewis's knowledge of what took place in Manchester on January 6, 1920. The learned judge has found that he knew all that was going on with regard to the company in Hooley's room at the Midland Hotel on that day. If it were necessary to decide whether the evidence established all that the learned judge found I should have some doubt about the matter, but I do not think it is necessary to consider it. I think, so far as the documents went, probably the whole matter was left to Wallis, who was the solicitor, and that neither Lewis nor any of the others took much, if any, trouble to inquire what was going on. But clearly Lewis knew that something was going to be done about that time with regard to the company. He knew that some business connected with the Jubilee Mill scheme was being transacted, for he gave a cheque for 15,000*l.*, part of the 30,000*l.* he was finding on the security of the debentures, and he accepted the results of what was done without comment when they did come to his knowledge. Of course, if these two findings of the learned judge be accepted, the conclusion to which I have come without them receives further support.

I have now to deal with the two legal defences. The first is that the shares and debentures were allotted by the company, even if properly registered and in existence on January 6, 1920, in violation of s. 82, sub-s. 1, of the Companies (Consolidation) Act, 1908, because they were allotted before a statement in lieu of prospectus had been filed as required by that section. It is said that by reason of this provision and certain decisions upon it, to which I need not refer, the issue of shares and debentures was void and that therefore there never was in the hands of the appellant any property of the company out of which he could or did make any profit. I will assume that the allotment was void and that it conferred no right upon the company to enforce obligations, if any, which would otherwise exist upon transferees of the shares or debentures, or impose any liability, except perhaps by estoppel, upon the company in respect of them. I do not, however, think that the appellant will, by reason of that position, be freed from liability. He was put into control of something which it may be was invalid out of which he was enabled to make a profit. I think he was not registered as owner of the shares and had not any certificate representing them, but he had blank transfers of the shares allotted and he had, if not the debentures eventually issued, a document representing the amount. He was then put by the company in control of something out of which he made a profit, and, whatever it was, valid or invalid, he held it from his position of promoter on behalf of the company, and I do not think when called upon to account for the profit he can justify himself in keeping that profit for himself by saying that the company had no legal justification for bringing the something into existence, or entrusting it to him.

The second defence in law is equally technical and unmeritorious. It is that when these shares and debentures were allotted there was no company in existence. The certificate of incorporation is dated January 6, 1920, but it was contended that upon the materials before the Court it should be held that the company was not incorporated on that day, or that even if incorporated on that day, the incorporation took place at a time in the day later than the allotment of the shares. This point was not taken in the Court below, and as it must depend upon evidence as to what exactly took place as to the registration I doubt if we ought to entertain it on appeal. We admitted, however, a statement from a representative of the registrar of companies from which, in connection with the file, it appears at least probable that the certificate of incorporation was not in fact signed until after January 6, 1920. I am not sure that on the statement as to the practice of the office the registration must not be held to have taken place on January 6, though the certificate was not signed till afterwards, but in any case it is provided by s. 17 of the Companies (Consolidation) Act, 1908, that the certificate is conclusive evidence that the registration and incorporation were duly effected on the day mentioned in the certificate, and must have effect accordingly. This, I think, was intended to prevent any such inquiry as was attempted in this case as to the actual date of writing the signature and we ought not to introduce the confusion and uncertainty which would result from ignoring the express provision making the certificate conclusive. If it be conclusive as to the date I think it must be taken as proving the existence of the company on the whole of that day and that it is not competent to the appellant to inquire at what particular hour of the day the registration was effected and the incorporation took place.

In my opinion the appellant was rightly held liable to account for the profit he had improperly made as a promoter of the company, and the amount for which he was held liable is thus stated on p. 60 of the transcript of the judgment of Astbury J. He says this: "In respect of the shares and debentures obtained by Lewis by way of secret profit as aforesaid, he has realized in cash, or in property accepted by him in lieu of cash, the following amounts: On January 13, 1920, by the sale of 3600 shares to Demery at 8*s.* each, 1440*l.*: on January 28, by the sale of 30,000 debentures, as explained above, 27,500*l.*; on February 3, by the sale of 2300 shares to Demery at 22*s.* 6*d.* each, 2587*l.* 10*s.*; on February 13, by the sale of 500 shares to Demery at 22*s.* 6*d.* each, 562*l.* 10*s.*; and on February 26, by the sale of 68,600 shares to Hooley at 10*s.* each, 34,300*l.*, of which 24,125*l.* was received in shares in other companies taken by him at that value, and 10,175*l.* in cash. This makes a total receipt by him of 66,390*l.*, which, after deducting 31,000*l.* paid by him towards the purchase price of the mill, leaves a balance of net profit in his hands 35,390*l.*, which has been proved and in respect of which no further inquiry is necessary." As to the debentures we were told that if the appellant were held liable he would in all probability be able to return them. If he returns them that item will be settled; if not, the judgment should stand as to it.

I agree with the rest of the items of liability with the exception of that relating to the part of the purchase price which was taken in the shares of other companies and not in cash. No doubt, in calculating the amount to be paid those shares were taken as equal in value to the amount in discharge of which they were taken, but I do not think that the appellant should be treated as having received that amount in cash, and I think he should only be held liable for the actual value of the shares.

With that variation, I think the decision of Astbury J. should be affirmed, and the appeal dismissed; but, as the other members of the Court take a different view, it will be allowed.

WARRINGTON L.J. On January 6, 1920 (to adopt the date of the certificate of incorporation), there was incorporated a company by the name of the Jubilee Cotton Mills, Ld., the main object of which was to acquire as a going concern and carry on the business of cotton spinners and mill owners, then carried on by one Thomas Fletcher, under the style of the Jubilee Cotton Mills, together with all the assets, real and personal, of the proprietors of the business or used in connection therewith, and to carry into effect an agreement between Thomas Fletcher and the company for the sale and purchase of the said business and effects. The capital of the company was 150,000*l.* in shares of 1*l.* each, and the company had power to raise money by the issue of mortgage debentures. By the agreement above referred to Thomas Fletcher purported to sell certain freehold hereditaments and the business and goodwill and the assets belonging thereto for 179,900*l.*, of which 10,000*l.* was to be the purchase money for the freehold hereditaments. The entire purchase money was to be satisfied by the allotment to the vendor of 149,900 fully paid up shares of 1*l.* each and the issue to him of mortgage debentures for the sum of 30,000*l.* Of the 149,900 shares, 75,000 were placed at the disposal of the appellant Lewis, as were the mortgage debentures for 30,000*l.* On March 15, 1921, the company was ordered to be wound up on a contributory's petition, and on March 23, 1921, the liquidator issued a summons for an order against Lewis for the payment of the amount of certain secret profits alleged to have been made by him, as promoter of the company, in connection with the purchase of the property above referred to. On November 28, 1921, Astbury J. made the order appealed from requiring Lewis to pay to the liquidator 35,390*l.*

Lewis appeals. The order was, of course, made upon the ground that Lewis was a promoter of the company and therefore in a fiduciary capacity towards it, and that the sum he is ordered to pay is the amount of secret profits made by him in that capacity for which he is accountable to the company.

The first question is one of fact: Was the appellant a promoter of the company? This is strenuously disputed by him, but has been found against him by the learned judge after hearing evidence viva voce in open Court. The appellant also claims to have the order reversed on certain legal grounds which I will state and deal with presently. Lastly, he says that if he is liable at all, he is not liable for anything like so large a sum as that which he has been ordered to pay.

The undisputed facts relating to the promotion and incorporation of the company and the connection of Lewis therewith are stated in great detail by Astbury J. in his judgment. I have read and considered his statement of them as it appears in the shorthand notes of his judgment in preference to the edited and abbreviated form of it printed in the report of the case in the Law Reports (1) and it seems to me quite unnecessary to repeat it here. I shall content myself by saying what I think is the result of these facts so far as they bear upon the questions to be decided. The scheme to which, early in December, 1919, Lewis became a party was that a company should be formed with a capital of 150,000*l.* divided into shares of 1*l.* each, and with a power to create and issue debentures to be exercised in the first instance by the creation and issue of debentures for 30,000*l.* That this company should take the freehold of the mills and the other property above referred to for 180,000*l.* to be satisfied by the issue of debentures for 30,000*l.* and the allotment of fully paid shares for 150,000*l.* That Lewis should provide 30,000*l.* in two instalments of 15,000*l.* each in cash as security, for which he should receive the debentures for 30,000*l.* That he should also receive 95,000 fully paid up shares of 1*l.* each, of which 20,000 were to go to Demery, leaving 75,000 at his own disposal. The remaining 55,000 shares were to go to the owner of the mill. It was further arranged that Demery was to carry out the details of the promotion and formation of the company, acting therein as the agent of Lewis.

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(1) [1922] 1 Ch. 100.

Lewis asserts that it was of the essence of the scheme, first, that the only persons interested in the company were to be Fletcher, Demery and himself, and, secondly, that the transaction was to be carried out by a sale by Fletcher to himself and by him to the company. In my opinion neither of these two conditions was of the essence of the transaction. The real essence of it, so far as Lewis was concerned, was that his 30,000*l.* should be secured by debentures and he should receive in addition the 75,000 shares by the sale of which he might make a considerable profit. I think it is clear that he did not care how the scheme was carried out provided no more than the stipulated capital was created and he received out of it 75,000 shares and was secured, as regards his cash advance upon it, by the debentures. He must very soon have realized that other people besides Fletcher, Demery and himself were concerned, and he never raised any objection. The authority originally given to Demery was never withdrawn or modified. As to the suggestion that an intermediate sale to Lewis and a resale by him to the company was alone contemplated, and that no such intermediate sale took place, I am of opinion that the substantial result of the transaction, so far as Lewis was concerned, was the same as if there had been an intermediate sale. Though (probably for fiscal reasons) the formality of an actual sale by Fletcher to him at one price, and by him to the company at an enhanced price, is dispensed with, the substance remains: the 95,000 shares divided between Lewis and Demery represent the enhanced price which the promoters caused the company to pay. It would have looked on the face of it a little better if there had been a sale by Lewis to the company, but he would, so far as his liability is concerned, be in no better position on that state of facts than he is at present: the extra price would still have been created by the promoters for their own profit. The reservation of the 100 shares for issue in cash did not affect the amount of Lewis's interest, and may, I think, be neglected for the purpose of the question I am dealing with—namely, was Lewis a promoter of the company actually formed? I am of opinion that in substance the company formed was that originally contemplated, and that Lewis was a promoter thereof and, therefore, in a fiduciary relation to the company and under the well established obligations attached to that relation. I have come to this conclusion on the undisputed facts, but the position as against Lewis is much strengthened by the finding of the learned judge as to what took place on January 6, 1920, when the directors were appointed, the purchase agreement was signed, etc., the debentures were created and issued and the shares allotted, blank transfers being executed by Fletcher of all he was not to retain for himself. The learned judge found that Lewis knew, first, that Fletcher was conveying direct to the company, secondly, that he was to obtain his agreed secret profits through and from him, and, thirdly, the nature and constitution of the company, and with this knowledge was an assenting party to what was in this connection done. This finding was, as the learned judge expressly states, based on his observation of the witnesses in the box, and it is, in my opinion, impossible for this Court to reverse it, but I desire to add that for myself I find it hard to believe that Lewis was in the state of profound ignorance in which he professes to have been. He was at Manchester on the day in question, knowing, as he admits, that the company would probably be going to allotment about that time; he met the party of confederates at lunch; he was greatly interested in the matter in which they were engaged; after lunch he was in the room where the business was transacted for, as he admits, ten or fifteen minutes, and signed cheques for the second 15,000*l.* he had undertaken to provide. It may be that to him as to the others—as they say—the details of the agreement and so forth were not explained, but it is to my mind incredible that he should not have known that the final steps were being taken for giving effect to the scheme originally started in December, 1919.

But the appellant says that, even assuming the fact to be as above mentioned—namely, that he was a promoter and that he improperly, as against the company, obtained the debentures and shares in question—he is not, in the circumstances of the present case, under any liability to the liquidator in respect thereof. In order to test the validity of this defence it is necessary first to determine on what principle a person in the position of the appellant, as promoter or director, is held to be under a liability to the company in respect of money or securities or shares of the company paid or issued to him. I think it is this: that, being in a fiduciary relation towards the company, he has improperly received from it, or at its expense, money or money's worth; that the company, under such circumstances, can require him to repay or to return to it the money or money's worth so received; that it has the option, if he has sold or disposed of any securities or shares of the company so improperly issued to him, of requiring him to pay any profits resulting therefrom; and further if the company so prefers, it may require him to pay compensation to it for the loss incurred by it from not being in a position to issue such securities or shares to other persons. That this is the principle upon which the Court acts in such cases is, I think, clearly shown by the judgment of Mellish L.J. in *Carling's Case.* (1) He is not to be punished for what he has done, but he has to disgorge what he has wrongfully obtained at the expense of the company or, if the company so desires, to pay compensation for what it has lost as above mentioned. But, supposing what he has received consists solely of an invalid issue of debentures and allotment of shares, so that he was never really entitled to any debentures or shares at all, can he then be held liable on the above principle? The appellant contends that in fact his position in the present case is what I have just described and that the answer to the question ought to be in the negative.

The grounds upon which he alleges that the debentures and shares were not in law validly issued are two: first, that contrary to the provisions of s. 82, sub-s. 1, of the Companies

(1) (1875) 1 Ch. D. 115, 126.

(Consolidation) Act, 1908, the shares and debentures were allotted before the filing with the registrar of the statement in lieu of prospectus required by that section, and, secondly, that although the certificate of incorporation is dated January 6, 1920, the Court, on the materials before it, ought to hold either that the company was not in fact incorporated on that day or that, if it were, its powers as a corporation did not come into existence prior to the allotment of the debentures and shares. I will deal with these contentions in order.

Sect. 82, sub-s. 1, of the Act of 1908, provides that: "A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and containing the particulars set out in the Second Schedule to this Act." The company did not issue a prospectus on or with reference to its formation and no statement in lieu of prospectus was filed until March 18, 1920. The allotment of debentures and shares took place on January 6, 1920. The provisions of s. 82 were, therefore, not complied with. The Act imposes no penalty on directors or other persons for non-compliance with s. 82, nor makes any provisions as to the effect of non-compliance, and the first question is, what is the true effect of the prohibition imposed on the company? The point has never been actually decided, but the question was discussed in *In re Blair Open Hearth Furnace Co.* (1), both in the Court below and in this Court. The question there was whether the effect of an untrue statement was to make the allotment void, it being argued that the filing of an untrue statement could not be treated as a compliance with the statute and the position was the same as if no statement had been filed at all, that is to say, that the allotment was void. It was held in both

(1) [1914] 1 Ch. 390.

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Courts that the filing of an untrue statement could not be treated as the filing of no statement at all, but as to the result of an allotment without the previous filing of a statement opinions were expressed in both Courts. In the Court below the case came before me and I there said (1): "I am inclined to agree . . . . that if no statement at all is filed, then, inasmuch as no consequence is imposed by the Act as the result of a failure to file the statement, it must be taken that the statute prohibits the company from proceeding to an allotment of shares and that any allotment of shares would accordingly be illegal." In the Court of Appeal the case came before Cozens-Hardy M.R., Swinfen Eady and Phillimore L.JJ. The Master of the Rolls does not in terms deal with the point now in question, but he certainly expressed no dissent from the opinion quoted above. Swinfen Eady and Phillimore L.JJ. assented to it, the former saying (2): "If no statement had been filed the allotment would have been invalid," and the latter saying (3): "I accept the argument of the appellants that the effect of s. 82 is to make an allotment of shares or debentures by a company . . . . which does not . . . . file a statement in lieu of prospectus, not voidable but void." In view of the opinions thus expressed of two members of the Court of Appeal, and the absence of any dissent on the part of the third, I may, I think, venture to adhere to and repeat as my opinion in the present case that the allotment of debentures and shares on January 6, 1920, was illegal and void. It was prohibited by the statutory constitution of the company and was, at the time it took place, an act which it was not within the powers of the company to do. If this is the true view of the nature of what was done on January 6, the appellant received nothing from the company and there is, in my opinion, nothing for which the company can require him to account. It is true that he purported to sell the supposed shares and debentures and received for them either cash or some other consideration; but in my opinion he

(1) [1914] 1 Ch. 400.
(2) Ibid. 409.
(3) Ibid. 412.

cannot be called upon to account for what he has so received. He can only be required to account to the company for that which, under the principle above mentioned, belonged to the company; from the company he received nothing; the money or other consideration he received was paid or delivered to him in the belief, it is true, that the subject of the sale existed, but this fact cannot, in my judgment, require the Court to treat the proceeds as arising from something improperly received from the company. Nor can the company succeed in charging him with compensation for loss inasmuch as, if the view I have expressed is correct, it was not prevented from issuing the shares and debentures to other persons if, after the filing of the statement in lieu of prospectus, it had been minded so to do.

It has been rather vaguely suggested that in some way the appellant is estopped from denying that he received the shares and debentures in question, but I fail to see how any estoppel can arise as against the appellant. Even if the company could be estopped from denying the validity of the allotment it could not make use of this in order to render the appellant liable to it for that for which he would not otherwise be liable. But I venture to doubt whether, under any doctrine of estoppel, an ultra vires transaction, such as that in question, could ever be treated as valid. The point does not arise for decision, and I say no more about it than this, that *Burkinshaw* v. *Nicolls* (1) is no authority for any such estoppel; all that that case decided was that when s. 25 of the Companies Act, 1867, provided that under the circumstances mentioned a share should be held subject to the payment of the whole amount in cash, it did not alter the law as to what is sufficient evidence of payment, which might be proved, and was in that case held to have been proved, by estoppel: see the judgment of Sir George Jessel M.R. in the same case in the Court of Appeal under the name of *In re British Farmers Pure Linseed Cake Co.* (2) We have nothing to do with any questions which may arise between the appellant and

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(1) 3 App. Cas. 1004.

(2) (1878) 7 Ch. D. 533, 536.

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those who bought shares from him, and I express no opinion on any such question.

For the reasons I have given I think the appeal succeeds and it is unnecessary to deal with the second of the grounds relied on by the appellant in support of his contention, that he received nothing for which he is accountable, but I think it is desirable that I should express my view upon it. In view of the statement read to us of a representative of the registrar of companies I think we are justified in assuming that, according to the practice of the office, the papers were provisionally accepted and, subject to the necessary payment of fees, registration allowed on January 6, 1920, and that a day or two later, on being satisfied that the necessary payment had been made, the registrar signed the certificate as of January 6, 1920. On this it is contended that on January 6 the company had no corporate existence and was, therefore, not in a position to allot the shares and debentures which it purported to allot on that day. The relevant sections of the Act of 1908 are ss. 15, 16 and 17. [His Lordship read the sections and continued :] Now on these three sections taken together it must, in my opinion, be held that registration took place when the memorandum and articles of association were accepted and retained by the registrar and that the certificate correctly stated the date of incorporation, but, even if this is not so, then under s. 17 the certificate is conclusive evidence, amongst other things, that the registration and incorporation of the company were duly effected on the day mentioned in the certificate and must have effect accordingly. In fact the material date is that mentioned in the certificate and not that on which the signature thereto was written. Moreover, I think the effect of s. 16 is that the date mentioned in the certificate is the first day of the company's corporate existence, and that it is not open to any one to prove the moment of time on that day on which a corporate act was done and then to say the company had not then been incorporated. Just as in the case of a natural-born man he is treated as having been alive during the whole of the day on which he was born,

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so, in my opinion, under the provisions of the Act, the corporate person should be treated as having been in existence for the whole of the day of incorporation. Any other view of the Act would, in my opinion, produce so much uncertainty and confusion that the Court ought not to adopt it unless compelled so to do by the clearest words, and in this case it is not so compelled.

In the view I take it is immaterial to consider the correctness or otherwise of the learned judge's conclusion as to the sum with which he has held the appellant to be charged. I am not, however, prepared to hold that it is right to charge a man with the nominal value of shares which were really worthless, even if, as between him and the purchaser, they have been taken as of great value. To do so seems to me to be to punish the man rather than to give to the company something to which, as between them, it is entitled: see per Mellish L.J. in *Carling's Case.* (1)

In my opinion the appeal ought to be allowed and the application of the liquidator dismissed with costs here and below.

YOUNGER L.J. To me the great question on this appeal is whether the promoters of the company which purported on January 6, 1920, to acquire the Jubilee Mills from Fletcher under the contract with him of that date were Lewis, Demery, Wallis and Hooley, or were Demery, Wallis and Hooley only, all acting together and for their own interests. If the latter statement represent the true view of the facts as they are now disclosed the appellant Lewis is entitled on that ground alone to have the order which has been made against him on the summons discharged. Now that Hooley was the master-mind directing this entire promotion with Wallis as his active assistant cannot be doubted; that Demery consciously, and the appellant unknowingly, were mere puppets in Hooley's hands is, as it seems to me, not open to question. Nothing effective in the whole business is shown to have been done except under the direction of Hooley, or Wallis acting for him. Neither Hooley nor Wallis, however, although the real protagonists in the promotion, have been made parties to these proceedings to recover alleged concealed promotion profits, the liquidator having chosen to proceed for these profits against Lewis and Demery only. Possibly for that reason the true orientation of the parties has been obscured and the real issue has become blurred, that issue being whether the intervention of Demery in this promotion at the effective period was or was not, whatever Lewis may have thought or believed, an intervention as an associate of Hooley, working with him and for the benefit of Hooley and himself, or an intervention by him working as the representative and, if you will, the agent of Lewis. Had that issue been appreciated in the Court below as clearly as I think it deserved to be, more importance must have been attached by the learned judge in his judgment to one fact of cardinal importance in the solution of it: the fact namely that the appellant was cheated and imposed upon by the thieves amongst whom he fell—to use Russell J.'s expression—at the very outset of this disastrous business, and that that deception had this amongst other consequences, that throughout the whole of the subsequent history it became the object of successful endeavour on the part of these persons to conceal that imposition from the appellant. Much that is otherwise strange in the evidence is, I think, more easily understood if this necessary fencing on the part of Hooley and his friends is borne in mind. On December 4, 1919, Lewis was told that the mill which Demery and Wallis were then placing before him—Wallis representing himself at the interview as the solicitor of Fletcher—belonged to Fletcher; that it was only owing to financial pressure that Fletcher was selling, and that, for that reason, he was willing to take as low a price as 40,000*l.* in cash and 55,000*l.* in shares of a company to be formed. In the cash price of 40,000*l.*, 10,000*l.* was included for the freehold. In point of fact, by that date Fletcher had already sold the mill to Hooley for as little as 20,000*l.* in cash and 35,000 shares in a company to be formed, and by Hooley's direction had agreed to purchase the freehold of the mill for 8750*l.* and hold it for Hooley at that price. When Lewis, accordingly, at that first interview agreed, as he thought, to purchase the mill from Fletcher on the terms stated to him he believed and was led to believe that Fletcher, as his vendor, would receive the whole price. Of the other parties to the interview, Wallis was, he believed, Fletcher's solicitor, Newton his valuer, while Demery he looked upon as his own friend. No mention of Hooley was, it is admitted, made at all. Accordingly, no one, except Fletcher on the one hand and himself on the other, was, Lewis believed, in any way interested in the transaction. The cotton boom was at its height. Lewis himself had no knowledge of mills, but he clearly is a man who was ready for any gamble. He was so much impressed with what he was told about this mill, with its 15,000*l.* a year profit, that he would have preferred, as he said, to buy it outright for cash, and carry the business on and get the benefit of the boom, with Fletcher as manager and Demery looking after his interests. Demery, however, stopped any such idea by the statement that Fletcher's terms for cash alone would be largely increased over the terms stated, and Lewis, credulous throughout, varied his intention and determined, as he said, and I see no reason to doubt his evidence on this point, to take over the business by a company to be formed by himself, through Demery, with Fletcher, himself and Demery—for Demery was to receive 20,000 shares from Lewis for his introduction of the business—as the only shareholders in it. Of course there had to be a company, whatever Lewis may have fondly thought: Hooley's contract with Fletcher required it; the provision of further profits for Hooley made it necessary, and on the evidence I can have no doubt that the capitalisation of that company had already been fixed by Hooley. Indeed it is quite plain that Hooley and Wallis had no intention of leaving anything in Lewis's hands. Lewis's introduction, with the cash he provided, was merely a necessary step in a long manipulation. The 150,000*l.* in shares and 30,000*l.* in debentures, which is the capitalisation prescribed in the semi-formal agreement of the following day, December 5, I doubt not was Hooley's pre-ordained requirement.

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(1) 1 Ch. D. 115, 126.

Now the transaction then apparently carried through was a gross fraud upon Lewis. Wallis was not Fletcher's solicitor. He was Hooley's solicitor. He had no authority from Fletcher to sell anything. Fletcher had then no mill to sell. Of the 15,000*l.* then paid to Wallis, acting, as Lewis believed, for Fletcher, 10,000*l.* only ultimately was received by Fletcher, and instead of the whole consideration going to Fletcher as his minimum price, 20,000 shares and 11,250*l.* in cash were under the scheme to go, and in the event 20,000 shares and 10,000*l.* in cash ultimately did go, altogether unknown to Lewis, into the pockets of Hooley and his associates. This fraud in its entirety was known to Wallis throughout, and I can have no doubt, and Mr. Hastings made it no part of the liquidator's case to contend otherwise, that it was known also to Demery—I should think at the latest when he saw Hooley at Derby on the next day. "Demery was, or soon became," says the learned judge, "an accomplice of Hooley with sufficient knowledge of quite enough that was going on to make his part in the transaction that took place on this and subsequent occasions a peculiarly bad one." All this, however, was successfully concealed from Lewis. Until long after Mr. Marple's action he had no idea that this large proportion of the consideration which he believed he was to pay to Fletcher was being intercepted by Hooley. He had no conception that he had never had any agreement with Fletcher at all. Indeed, the deception then practised upon Lewis and maintained throughout was apparently not appreciated even by the liquidator when he issued the summons on which the order now under appeal was made, for that summons, even as amended, seeks to make Lewis and Demery responsible as promoters "for the profits received by them respectively on the purchase and resale of the Jubilee Cotton Mills by them." There are in the learned judge's judgment itself passages in which he seems to treat the liability of Lewis as one to be determined on the footing that he, in fact, purchased the mills and resold them to the company at a greatly enhanced price. Whatever he did, he did not do that; whatever interest in the matter the appellant had he never was, he never could have been, a vendor to the company of anything at all. In truth, the actual promotion of the company and the form which it took was in no way influenced by that so-called agreement of December 4. The actual promotion was a Hooley promotion throughout its entire course, and the great question is whether Lewis can properly be made responsible for it in these proceedings or at all.

The details of that promotion approached from the particular angle from which, for my present purpose, they must be regarded can fortunately, in view of the elaborate statement by the learned judge of all the incidents in the case, be summarised very shortly. Fletcher since early in 1919 had this mill of his on sale. He was embarrassed through his Russian experiences; but for them I do not doubt he would not have sold at all. His mill was a good sound concern, which had earned substantial profits. With the advent of the cotton boom it became in the eyes of a man like Hooley an attractive proposition for unloading on a credulous public. In November Hooley, Macdonald being associated with him in the purchase, agreed, as I have said, to buy the mill from Fletcher as from November 25 for 20,000*l.* in cash and 35,000*l.* in shares of a company to be formed, and he made with Fletcher the arrangement for purchase of the freehold which I have already detailed. 20,000*l.* in cash Fletcher stipulated for. That sum in cash Hooley either did not possess or could not at the moment conveniently command. Demery had been, up to 1913, in Hooley's employment and was well known to him; Lewis, a young and, through fortunate speculation and trading, then a wealthy Cardiff shipowner, was at least an acquaintance of Demery, although up to that time he had had no business transactions with him. Wallis, Hooley's solicitor and cousin, informed Demery of this Jubilee Mill proposition, Demery says, early in December, and Demery proposed to introduce Lewis to the transaction as a man

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who might find the necessary cash to carry it out. The interview of December 4 it was possible for Demery to arrange, because he and Lewis were to be in London together on that day for the Beckett-Carpentier fight. The result was the agreement, then arrived at, to which I have referred. Now, as I have said, it was never intended by Hooley—the sequel, I think, clearly shows it—that the intervention of Lewis should interfere with his promotion already resolved upon. The terms on which Lewis was providing the 40,000*l.* had, of course, to be satisfied: nothing more; and the way in which this was done, in a form which kept Lewis under the belief that he, through the agency of Demery, was purchasing the mill from Fletcher for 40,000*l.* in cash and 55,000*l.* in shares and was reselling it to a company of his own for 30,000*l.* in debentures and 150,000*l.* in shares, whereas all that was happening was that Hooley out of his promotion was allotting to Lewis 30,000*l.* in debentures and 95,000*l.* in shares—20,000 of which by Lewis's direction were to go to Demery—was a masterpiece of deception only rendered possible by the fact that Lewis took no active part in the matter and left, as he thought, his whole interest in the hands of Demery, an accomplice of Hooley, and because also as early as December Lewis, through the sale he supposed he had made of his entire interest in the shares and debentures, had ceased, as he thought, to have any further direct interest in the company as a company. All that remained for him to do was, he thought, to complete his payments under the December agreement, so that the company might be possessed of the mill and business, and so that the shares and debentures he had agreed to sell might be deliverable. He supposed that Demery, in relation to the company and its actual formation, would take his instructions from those who had stepped into his place as owners of its shares. That Lewis never formally withdrew his authority, at the outset given to Demery, to proceed on his behalf with the registration of the company is quite true, and if there were no more in the case it might, I agree, well be that Lewis, as Demery's principal, could not escape from the consequences of that position, although there had been no personal intervention of his own in the matter. But things did not stop there. The company actually formed was, in my judgment, in no true sense either the creation of Lewis or of any one acting for him. It was, and it was entirely, the creation of Hooley and Wallis with Demery acting as their accomplice and associate, a creation, too, carried out in fraud of Lewis, because carried out in such a way as to enable these persons to appropriate to themselves the 10,000*l.* of Lewis's cash and the 20,000 shares which had been represented to him, when he agreed to pay and find them, as going to Fletcher —a vendor, who would not without receiving them, sell at all. It was on January 6 that the matter was completed. The company is stated in its certificate of incorporation to have been registered on that day, and was registered with a memorandum and articles of association prepared by Wallis. The signatories to the memorandum were Fletcher and Poyser, his clerk, Macdonald, Newton, present at the interview of December 4, and three others described by Demery in his evidence as being, according to Hooley, "local people whom Wallis had got to sign." Very clearly, in my judgment, all the signatories not directors were mere nominees of Wallis, nor has the official receiver, so far as I know, ever suggested the contrary. The purpose of the company is stated to be to acquire and take over as a going concern and carry on the business of cotton spinners then carried on by Thomas Fletcher at Todmorden under the style or form of the "Jubilee Cotton Mills" and with a view thereto to enter into and carry into effect an agreement which had already been prepared and engrossed and was expressed to be made between Thomas Fletcher of the one part and the company of the other part. That agreement, prepared by Wallis and produced by him with a bundle of other documents for the first time at a so-called meeting of directors of the company on the same January 6 was an agreement for sale direct from Fletcher to the company of the freehold and the entire business as from November 25, 1919, for 149,900*l.* in shares and 30,000*l.* in debentures of the company. Fletcher was to be managing director of the company for five years at 750*l.* a year. The agenda produced to that meeting by Wallis and the conflicting accounts of the proceedings thereat are detailed by the learned judge. I need not again further elaborate them here. What cannot be doubted as a result of all the stories told is that the whole proceedings which took place in Hooley's own room were engineered by Wallis and Hooley alone. Fletcher himself had no knowledge of the contents of the agreement at the time he signed it. He was told by Wallis, he said, that it was to carry out the contract of sale he had made with Hooley in November; he was told by Hooley that the shares were to be issued to him, and all but his own 35,000 to be transferred by him as directed by Hooley to secure in that way what he was entitled to under the original contract, which at the same time, as to cash, was satisfied by a cheque of 10,000*l.* then taken from Lewis in part discharge of his contract of December 4. The directions then given to Fletcher and carried out by him with regard to the balance, after satisfying his own claims under the November agreement, went, although I am quite satisfied no one present knew it except Wallis, Hooley and Demery, as to 75,000 for Lewis and 20,000 for Demery under his original arrangement with Lewis, and the balance to Hooley and his associates, he having previously intercepted and retained 10,000*l.* of Lewis's cash.

Now I have read and reread all the evidence in this case, as also the evidence of Lewis before Russell J., and I can myself have no doubt that this company in the form in which it was registered and fixed, with its contract of purchase, was the handiwork really of Hooley and Wallis, and in an effective promoting sense of them alone. That Demery with the full knowledge he had of the whole business was a promoter also, I agree; but his position was that of a mere subordinate under Hooley—a sort of Brakespeare who, as Hooley's secretary, pervaded the whole proceedings. The judge has gone at length into the part taken by Lewis in the proceedings of January 6, and rejecting his express evidence, and that of his secretary Best, to the contrary, he has, I think, come to the conclusion that he was present the whole time. I shall give in a moment my reasons for thinking that the learned judge would, or at least might, have reached another conclusion on this point if there had been present to his mind very important considerations supporting Lewis's story, which apparently did not occur to him as such. But the learned judge did not find, and he could not, I think, have so found, that Lewis was made aware at that meeting of what, in fact, was being done, and that Fletcher was only receiving in all 20,000*l.* in cash and 35,000 shares instead of the 30,000*l.* he had himself by that time provided, and 55,000 shares, to which he was entitled under the December agreement. Lewis never knew that; he never knew that the smaller payment was an essential feature of the promotion, as a result of which Hooley defrauded him as well as the company; and it is, I think, enough that he should have been ignorant of that fact. His ignorance shows that this promotion was not his, while, with regard to Demery, of two things, one: either he, too, was excluded by Hooley from any part in the promotion except as a mere subordinate; or he also was an active party to the whole fraud. In either case, as it seems to me, Lewis, who it is not suggested himself took any personal part in the promotion, cannot be fixed with liability as a promoter. If the first alternative be the true one, Demery, through whom alone his responsibility is traced, does not count; and if the second be adopted then Lewis is equally, I think, free from liability, because Demery long before this time, as the judge has found "the accomplice of Hooley," was engaged in carrying out this matter, not for Lewis's benefit but for his own private ends: see *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1) But I desire to add that the learned judge in dealing with his evidence at this stage hardly, as it seems to me, did justice to the appellant. I may say that having read very carefully the appellant's evidence both before Russell J. and before the learned judge, and having studied it from every point of view, I should myself arrive at the conclusion with regard to the appellant that Russell J. did. My view would be that he was not consciously an untruthful witness, although he said many things which were not true. For instance, the readiness with which unsolicited he handed over to the official receiver on the commencement of the liquidation all his papers without reserve, rather than the alleged non-inclusion of documents in his affidavit in *Marple* v. *Hooley* (1), of which so much was attempted to be made in cross-examination, is the striking circumstance; and there are many incidents in the course of his evidence before the learned judge, from which he stated he was drawing a conclusion adverse to the witness, that, to my mind, hardly justified any such conclusion. Moreover, it is a very striking fact, that although if the learned judge be right the appellant ought to account for over 30,000*l.* of so-called concealed profit from this transaction, even in *Marple* v. *Hooley* (1) his honesty was not questioned, and it is the other persons concerned and not he who have been accused and prosecuted to conviction. But *Marple* v. *Hooley* (1) is not before us on appeal. It is on this misfeasance summons which is before us that the learned judge's observations were made, and I hope I should be the last person to minimise the extreme importance of such a finding as his. Nevertheless, on this part of the case I think it right to say this much. Mr. Hastings before us intimated that in support of the learned judge's view of the appellant's evidence on this question of what happened on December 6 he did not rely upon what was said by Demery and the other respondents. I think he was well advised in taking this course. Even Mr. Fletcher, for whom one must feel much sympathy in this case, was obviously so prepossessed with the idea, for which, so far as he was personally concerned, there seems to have been no warrant, that Lewis was the only promoter, that his evidence as to Lewis's presence in the room on January 6 all

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(1) (1887) 18 Q. B. D. 714.

(1) Unreported.

day must be seriously discounted. And see what the surrounding circumstances were. On December 29 Hooley at a first interview with Lewis had taken from him at Gloucester 27,500*l.* for Stroud Tape Machine shares. Lewis had never seen Stroud machines at that time. At the same meeting at Gloucester the bargain for the sale of all Lewis's shares and debentures in the Jubilee Mills was struck. Lewis's interest in Stroud Tape Machine shares had therefore begun; his interest in Jubilee had gone; but Hooley had still to get from him 15,000*l.* in cash under his December agreement, and without 10,000*l.* of that sum Fletcher would not transfer the mill. Lewis accordingly goes to Manchester on Hooley's invitation, sees the machine, and as to the cash was, he says, called into the room where the directors of the mills were assembled to sign two cheques for 15,000*l.*, and having signed them went out—Best being actually prevented from entering the room along with him. The story is corroborated by Best. It is a strange story, I agree, but when I remember that Hooley could treat Lewis's interest in Jubilee as being then disposed of; that his presence during that first meeting would endanger disclosure of his original fraud upon him; that the receipt for the 15,000*l.* is given on January 6 by Wallis to Demery, and is not given by Fletcher, as would naturally have been expected by Lewis had he been permitted to be present at the completion of his supposed transaction with Fletcher—all these things are to my mind the strongest corroboration of a story which I cannot think Best, or even Lewis, could easily have invented. Be, however, this as it may, my opinion is, for the reasons I have given, that it is not established that the appellant was in fact or in law a promoter of this company. And I have the more satisfaction in reaching this conclusion as to the real relation in which the appellant stood to this promotion for the reason that the two acts of promotion which in fact gave rise to the company's claim for redress were certainly acts for which the appellant, as it seems to me, ought not to be held responsible, and for one of them it is not even alleged that he is. The complaint here, it must be remembered, is not the making of profits, but the concealment of the fact. Any agreement for sale, properly drawn, would have disclosed these profits. The learned judge says in his judgment that the actual agreement of January 6 took the form it did in order to conceal the connection of Lewis with the promotion. I cannot myself take that view. The real transaction of January 6 was a sale by Fletcher on the terms of the agreement with Hooley and Macdonald of November 29, with a resale by Hooley and Macdonald to the company on the terms of the agreement of January 6. That agreement took the form it did, not, as I conceive, because of any fear of the mention of Lewis's name hurting the venture, but because it would have been serious, if not fatal, to disclose Hooley's name in connection with it, and perhaps more serious still in its immediate results to set forth the transaction in its true light and thus disclose to Lewis the fraud that had been perpetrated upon him by Hooley and his associates. Certainly Lewis can in no way be held responsible for the form of that agreement. Nor, again, is he responsible for the statement in lieu of prospectus which was the second document which was effective to conceal the intermediate profit. But in this connection it is well to point out that these transactions, unjustifiable as they were, and there is no excuse for them, have not inflicted any real damage on the company as a company. The only consideration given by the company for the property it acquired was paper. For the full sum secured by the debentures issued, the company, of course, became liable, but no one has suggested that for the amount of these debentures the company, even apart from the freehold, did not receive more than full value. So far as the shares were concerned, it mattered not to the company as a company what their nominal value was. In the aggregate they could never represent more than the residue of the company's assets after payment of all its debts, a residue not capable either of increase or decrease by the nominal value of the shares. The case is not as if the shares had been issued to the public for cash, which might have been applied in acquiring assets

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of really equivalent value, but instead was handed over to the vendor under a contract for property of relatively insignificant amount. In this case, as the learned judge says, the shares were of no real value. Moreover, with the possible exception of the three nominees of shares of 1*l.* each, every shareholder and director of the company had the fullest notice of all that was done, so that the case was as nearly a case of the class of *In re British Seamless Paper Box Co.* (1) as any case can be. It is true that the company might have suffered somewhat from the transaction if it had desired to issue further shares. Watered as these would have been by the first issue, they could not perhaps have been issued at all. But this company has not sought to issue any further shares. In one passage of his judgment the learned judge seems to indicate that the present claim of the company is assisted, if indeed it is not made possible, by the fact that the shares in question have not been retained by their original allottees, but that many of them have been transferred to other hands. This, in my judgment, makes no difference. The claim of the company to recover this concealed profit is quite unaffected by any change in the shareholding interest, and it is desirable to point out this because it indicates again what appears in so many other places, that the real complaint here is one at the instance of people like Mr. Marple, who have been defrauded by independent and fraudulent representations of Hooley into purchasing their shares. It is not, perhaps, an accident that this liquidator, so far as professional advice is concerned, is in the same professional hands as those which were concerned for Mr. Marple in his action. In the damage, however, sustained by him over his purchase of shares from Hooley the company is in no way involved. The truth indeed is that if the liquidator had succeeded in obtaining all the relief he claimed by the three summonses issued by him on March 23, 1921, the result would have been that no profit earned by the company through the most successful trading of the most inflated of booms would have rivalled the profit it would have secured to itself from being the victim of a successful fraud. It cannot be too plainly repeated that the expense to the company of the property it has got, assuming everything in relation to the issue to be regular and binding, is limited to the expense of printing its share certificates plus the obligation to pay 30,000*l.* and interest on the debentures. Even the funds for the payment of the unjustifiable dividend of 33⅓ per cent., of which complaint is made in one of the summonses, were paid to the company on terms which in the event impose upon it no liability for any kind of repayment at all.

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(1) 17 Ch. D. 467.

It is, I think, necessary to draw attention to this aspect of the case. In the circumstances where, in my judgment, no fraud is established against the appellant and no damage has been sustained by the company, the Court must be careful not to be misled by opprobrious epithets as to other frauds committed by other persons on other people, and in the form of an account of profits be thereby induced to make an order which would give the company much more than has really been made at its expense. Accordingly, I should wish to add in this particular connection that had the promotership of Lewis been, in my judgment, established, I should have entirely agreed with my Lord that the sum awarded against him by the learned judge could not have stood. It would, in my opinion, have been subject to great deductions, as explained by the Master of the Rolls. I also wish to add, that with Warrington L.J. I am of the opinion that the claim against Lewis fails also on the ground that the issue of the shares and debentures in the present case was entirely void for the reasons given by him. I so entirely agree with the reasoning of the Lord Justice on that subject that I do not deem it fitting further to prolong my judgment by giving my reasons in my own words.

Had it been necessary, I should have desired further to consider the question whether the same result does not follow because the entire issue of shares took place and was resolved upon before there was in actual existence any company at all. It is, however, in the view I take of the rest of the case, unnecessary that I should deal with this subject and therefore I say no more about it.

In my judgment, this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Grundy, Kershaw, Samson & Co.*
Solicitors for official receiver: *Cohn, Seligman & Bax.*

W. I. C.

In re FARROW'S BANK, LIMITED.

[00485 of 1920.]

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ASTBURY J.
July 11, 18, 19.
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Banker—Customer—Relationship—Collecting Agent or Debtor—Crossed Cheque credited before Clearance—Proceeds not available until Clearance—Suspension of Bank before Clearance—Winding up after Clearance—Rights of Customer.

Where a customer pays a crossed cheque into his bank, the question whether the bank receive it as holders for value or as agents for collection is a pure question of fact.

The fact that the cheque is immediately credited in the ledger does not necessarily make the bank holders for value. That inference may be rebutted by notices in the pass book and paying-in slip or other evidence showing that the customer could not draw before clearance.

Observations of Lords Macnaghten and Lindley in *Capital and Counties Bank* v. *Gordon* [1903] A. C. 240, 245, 249 explained.

If the bank receive the cheque as agents for collection and stop payment before it is finally cleared at the clearing house, they can only receive and hold the proceeds as collecting agents for their customer, and not on the ordinary bank relationship of debtor and creditor.

In re Agra and Masterman's Bank [1866] W. N. 399; 36 L. J. (Ch.) 151 applied.

Consequently, in a winding up following on the stoppage the liquidator must pay the full proceeds of a cheque cleared after the stoppage to the customer, although it was cleared shortly before the actual winding up.

So *held* by Astbury J.

On appeal the decision of Astbury J. on the second point was affirmed on the facts, there being no appeal against the decision on the point that the bank received the cheque as agents for collection.

SUMMONS.

On Thursday, December 16, 1920, Voyce having received a crossed order cheque for 1493*l.* drawn on the London Joint

City and Midland Bank, West Bromwich branch, indorsed and paid it into his account at Farrow's Bank, Birmingham branch, which having forthwith credited him with the amount in their ledger remitted the cheque to Barclays Bank as their clearing agents.

On Friday, December 17, Barclays Bank presented the cheque at the clearing house to the London Joint City and Midland Bank, who remitted it to their West Bromwich branch. Barclays Bank at the same time credited Farrow's head office on the clearance sheet, subject to recourse.

On Saturday, December 18, the West Bromwich branch of the drawer's bank debited the drawer, credited their head office and advised them that the cheque was cleared.

On Monday, December 20, the London Joint City and Midland Bank having received the letter of advice settled with Barclays Bank through the clearing house at 12.30 P.M. and Barclays Bank thereupon advised their principals, Farrow's head office, that the cheque was cleared.

In the meantime—namely, at 8.30 A.M.—Farrow's Bank had suspended payment, a notice to that effect being posted on the doors of the head office, and instructions to suspend being wired to all the branches at 12.15 P.M. For the purposes of the liquidation the determination to suspend was treated as made on Sunday, December 19, and all cash remittances received on the Monday were returned.

On Monday, December 20, at 2.20 P.M., a petition to wind up Farrow's Bank was presented, and on Tuesday, December 21, the Official Receiver was appointed provisional liquidator pending the hearing. The winding-up order was made on January 11, 1921, and the Official Receiver continued as liquidator.

In these circumstances the question arose whether the proceeds of the cheque belonged to Farrow's Bank as part of their general assets, so that Voyce had merely a right of proof; or whether they were mere collecting agents, so that having suspended payment before the cheque was cleared they remained in that position, and the proceeds belonged entirely to Voyce.

On March 17, 1922, the liquidator issued this summons to determine the point, which arose in many similar instances.

The chief cashier deposed that according to the practice of Farrow's Bank this country cheque though immediately credited could not as a rule have been drawn upon until the third weekday after it was paid in—i.e., in the present case Monday, December 20, at 10 A.M.—though in the case of an overdraft it would at once have reduced the amount on which interest was payable.

Voyce deposed that he paid in the cheque in order that in the ordinary course of banking practice it might be collected and credited to his account and that there was no arrangement that cheques paid in should become the property of the bank, or that he should have immediate credit therefor.

At the time of payment in Voyce had already a substantial credit balance, but certain cheques drawn by him between December 15 and December 18 both inclusive would more than have exhausted that credit, and would have impinged on the 1493*l*. These cheques however were all returned unpaid.

The passbook contained the following notices as to "Terms of Business for Current Accounts."

Para. 1: "Current accounts are opened on the terms usually adopted by Bankers."

Para. 4: "The Bank will not be responsible for any Cheques, Bills, Notes, Coupons, or Securities forwarded by post for collection or acceptance, nor for any delay which may arise. *Proceeds of remittances will only be available after receipt of the same by the Bank.*"

The paying-in slip contained the note: "Customers are respectfully informed that the Bank reserves to itself the right, at its discretion, to defer payment of cheques drawn against uncleared effects which may have been credited to the account."

The summons came on for hearing before Astbury J. on July 11, 1922.

Topham K.C. and *Lionel Cohen* for the liquidator. There are really two separate points.

First. By crediting the cheque, on its payment in, the bank became holders for value and not mere agents for collection: *Capital and Counties Bank* v. *Gordon.* (1) In that case it was consequently held that they were disentitled to the protection given to collecting agents by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 82. This protection is now given them by the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), which provides that a banker receives payment of a crossed cheque for a customer "within the meaning" of s. 82, "notwithstanding that he credits the customer's account with the amount of the cheque before receiving payment thereof." But though getting that statutory protection, the usual relationship of debtor and creditor arose immediately on the crediting, which admittedly would at once have reduced the interest on an overdraft. This is borne out by the credit slip, which reserves a right to "defer payment" of cheques drawn against uncleared effects. Unless the bank were debtors this would be meaningless. How could uncleared effects be drawn against if the bank were mere collecting agents? It is an obvious case of "Debitum in præsenti, solvendum in futuro."

Secondly. Assume that the liquidator is wrong on his first point and that the bank originally took the cheque as collecting agents. In that case their duty was performed, their agency ceased, and they became ordinary debtors the moment the cheque was collected. Now the cheque was presented and debited at the drawer's bank on Saturday, December 18. That was really the crucial moment. The statement of that fact in the letter of advice to the drawer's head office, and the subsequent adjustment of the total balances between the London banks at the clearing house on Monday, December 20, were mere formal machinery recording that past transaction, and even that formal record was completed by 12.30 P.M.—i.e., nearly two hours before the winding-up petition was presented.

Micklem K.C. and *Bischoff* for Voyce. First. The character in which the bank took the cheque is a pure question of fact: *M'Lean* v. *Clydesdale Banking Co.* (1) Prima facie they took it as collecting agents: *Clarke* v. *London and County Banking Co.* (2) The mere act of crediting the cheque in their ledger without their customer's knowledge did not make them holders for value: *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* (3); *Bevan* v. *National Bank.* (4)

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(1) [1903] A. C. 240, 245, 248, 249.

In *Gordon's Case* (5), now practically overruled by the 1906 Act, there was a special arrangement that the customer might draw on uncleared cheques. In the present case the notices in the passbook and paying-in slip are to the direct contrary.

Secondly. The bank did not receive the money, or become entitled to a credit representing the proceeds of the cheque, until the final adjustment at the clearing house. That was at 12.30 P.M. on the Monday. At that moment they were still collecting agents, and as they had already ceased to carry on ordinary banking business, they could not change their position and hold the money as debtors to Voyce. They could not receive money as bankers and place it to Voyce's current account after the stoppage.

This was obviously the view of Wood V.-C. in *In re Agra and Masterman's Bank* (6), though he gave no final decision on the point.

Topham K.C. and *Lionel Cohen* in reply. First. In the *Akrokerri Case* (3) and in *Bevan's Case* (4) the crediting was without the customer's knowledge, and in the former case it would have been ultra vires for the bank to become holders for value. In the present case there is no question of ultra vires, and so far from the customer being in ignorance, the paying-in slip points to immediate crediting with two or three days' grace reserved for drawing. But the material fact is the immediate crediting. That made the bank holders for value and debtors to Voyce: *Gordon's Case.* (5) The fact

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(1) (1883) 9 App. Cas. 95, 109, 115.

(2) [1897] 1 Q. B. 552.

(3) [1904] 2 K. B. 465, 470.

(4) (1906) 23 Times L. R. 65.

(5) [1903] A. C. 240, 245, 248, 249.

(6) [1866] W. N. 399; 36 L. J. (Ch.) 151.

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that notwithstanding this relationship they would have been entitled to the protection of the Bills of Exchange Acts, 1882 to 1906, does not touch this point.

In *Clarke's Case* (1) the cheque was paid in for collection only and not credited before clearance: see per Collins M.R. in *Gordon's Case* (2) in the Court of Appeal; and as to the undoubted effect of immediate crediting see *Royal Bank of Scotland* v. *Tottenham* (3) with the comments of the Court of Appeal thereon in *Gordon's Case.* (4)

Secondly. If the liquidator is wrong on the main point, the clearance point arises. Now, although the clearing was not formally completed at the Clearing House until 12.30 P.M. on the Monday the cheque was really through on the Saturday when the drawer was debited. After the Saturday there was no remittance or receipt of new money as in *In re Agra and Masterman's Bank.* (5) There was merely a formal adjustment between the clearing banks of mutual accounts in respect of past transactions found correct. This adjustment itself took place nearly two hours before the liquidation.

A compulsory winding up commences "at the time" of the presentation of the petition: Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 139. A bankruptcy commences "at the time" of the act of bankruptcy: Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 37, sub-s. 1, replacing Bankruptcy Act, 1883 (47 & 48 Vict. c. 52), s. 43. In bankruptcy that means the actual moment of the day: *In re Bumpus.* (6) The same meaning must be given to the words "at the time" in the corresponding section of the Companies Act.

ASTBURY J. [after stating the facts]: There are two questions to be determined on this summons. The first is whether the bank took this cheque on December 16 as holders for value, or according to the more usual practice of bankers as agents for collection. The second question is: If they took the cheque as agents for collection did they so

(1) [1897] 1 Q. B. 552.
(2) [1902] 1 K. B. 242, 270, 271.
(3) [1894] 2 Q. B. 715.
(4) [1902] 1 K. B. 272, 283.
(5) [1866] W. N. 399; 36 L. J. (Ch.) 151.
(6) [1908] 2 K. B. 330.

collect the money as to convert the relationship between themselves and Voyce from that of agent and principal into that of debtor and creditor?

On the first point, the question in what character the bank received the cheque on December 16 is a pure question of fact: *M'Lean* v. *Clydesdale Banking Co.* (1) In that case it was held on the evidence that the bank took the cheque as holders for value. Lord Blackburn said (2): "Now in the present case did the bank get the cheque in that way as a mere agent, and nothing else, or did they get it in order that they might have the property in it transferred to them and that they might become holders of it? The condescendence makes this averment: 'The said draft or cheque was indorsed by the said W. B. Cotton, and was by him delivered to the pursuers on or about the 14th day of January, 1882, on their paying to him the said sum of 265*l.* 2*s.* 6*d.*, or placing the same to the credit of his account which was then overdrawn to an amount in excess of the said sum, and thereby extinguishing the said account to that extent.'" In other words the decision was based on the fact that at the time when the cheque was paid to the bank the person paying in the cheque and the bank both intended that the bank should immediately become holders for value.

The liquidator relies upon *Gordon's Case.* (3) But it seems to me that the expressions relied upon in the judgments must be read, and only can be read, with reference to the facts of that case. The most relevant fact for the present purpose was that as between the customer and the bank there was an arrangement, or course of practice, under which the bank allowed the customer to draw against the amounts of cheques paid in and credited before they were cleared. With these facts before him Lord Macnaghten said (4): "It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account the banker becomes holder for value of the cheque. It is impossible, I think, to say that a banker is merely receiving

(1) 9 App. Cas. 95, 115.
(2) 9 App. Cas. 109.
(3) [1903] A. C. 240, 245, 248, 249.
(4) [1903] A. C. 245.

payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value." Of course, in a case where the facts were as I have stated that result necessarily follows. Lord Lindley said (1): "It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right." There, again, the same remark applies.

It is no longer arguable, if ever it was, that the mere crediting by a bank of a cheque paid into a customer's account independently of any knowledge of the customer, or arrangement as between him and the bank, converts the bank into a holder for value as distinct from a recipient for the customer within the meaning of s. 82 of the Bills of Exchange Act, 1882. This is now laid down by the Bills of Exchange (Crossed Cheques) Act, 1906. But even before that Act it was held in certainly more than one case that the mere crediting of a cheque to the customer's account behind his back and without his knowledge does not prevent the bank being an agent for collection in the ordinary way.

In the *Akrokerri Case* (2) Bigham J. said: "The expression 'for a customer' has been often discussed, and its meaning has now been made fairly plain by judicial interpretation. Money is received for a customer in those cases only where the banker acts as a mere agent to collect. Thus it is that if the banker as between himself and his customer becomes the holder of the cheque for value before he collects it he does not receive the payment for his customer; he receives it for himself. The question, then, resolves itself into this—Did the defendants receive the payments as mere collecting agents for Nobbs? It is argued that they did not, because they gave Nobbs credit for the value of the cheques in their ledger before they sent them to Williams Deacon & Co. for collection, and so, it is said, made themselves holders of the cheques for value. But, in my opinion, the entries in the bank's ledgers did not make the bank holders for value. The entries neither

(1) [1903] A. C. 249.

(2) [1904] 2 K. B. 465, 470.

conferred any right on Nobbs to draw the money out of the bank, nor did they fix the bank with any liability to pay the money to him. It might have been different if the entries had been made in the passbook, for that book belongs to the customer, and the entries made in it by the bank are statements on which the customer is entitled to act. Suppose, after the ledger entries were made, but before the cheques were sent to Williams Deacon & Co., Nobbs had asked the defendant bank to return him the cheques, could the bank have refused to comply with his request? Could they have said, 'No; the cheques are ours, for by entries in our ledger of which you know nothing we have given you credit for the amounts, and so have made ourselves holders for value'? I think not Nobbs, having regard to the terms on which the business was carried on, would have been entitled to say that he had never assented to any transfer of the cheques, and that therefore they were still his. In truth, notwithstanding the ledger entries, no credit was given to Nobbs; nor was it intended that he should have credit; and, if Nobbs had demanded the money, the defendants would have been entitled to refuse to pay it to him. I think, therefore, that the defendants, in forwarding the cheques to Williams Deacon & Co., and so obtaining the money, were acting as mere agents to collect and were receiving the payment for their customer within the meaning of the section of the Act."

In the present case there was no entry made at any relevant date in Voyce's passbook and the only entries made were made in the Birmingham branch of Farrow's Bank in their ledgers or books on December 16.

But the case does not really rest there, because in addition to the evidence that I have read, there is the following notice printed in the customer's passbook: "Current accounts are opened on the terms usually adopted by bankers. The bank will not be responsible for any cheques, bills, notes, coupons, or securities forwarded by post for collection or acceptance, nor for any delay which may arise. Proceeds of remittances will only be available after receipt of the same by the bank." On the paying-in slip there is this note: "Customers are

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respectfully informed that the bank reserves to itself the right at its discretion to defer payment of cheques drawn against uncleared effects which may have been credited to the account." If the bank had become holders for value of the cheque they could do no such thing.

On the first point, therefore, and on the facts I hold that the bank in the present case became agents for collection in respect of the cheque in question and not holders of the cheque for value.

This being so, the second point arises, whether the money in respect of this cheque was received by Farrow's Bank in time for it to become their property as on a debtor and creditor account as distinct from the previous relationship of agent and principal which existed for the reasons I have mentioned.

In *In re Agra and Masterman's Bank* (1) the headnote states: " Where a firm paid a cheque into a branch bank in India to their current account after the stoppage of the parent bank in England, but before the branch had notice of that stoppage, and afterwards, on the same day, the branch received notice of the stoppage of the bank in England, and stopped itself: Held, that an application by the firm to be repaid the amount of the cheque in full must be refused; but this order was without prejudice to a renewal of the application, if the applicants should find that their cheque had not been cashed until after the branch had received notice of the stoppage of the bank in England." Wood V.-C. said it was clear that after a bank had ceased all functions it could not receive anything in specie for a special purpose if the special purpose had become impossible, and after deciding the case as he did on the facts then before him the learned judge said: " The order would be to refuse this application, but without prejudice to the applicants renewing it if they should find that the cheque was not cashed until after notice of the stoppage of the bank in England had been received by the branch at Calcutta."

That amounts to saying that if after the bank had stopped payment it had then purported to treat cash subsequently received by it as its own and not as the cash of the customer, the decision would have to be reconsidered.

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(1) [1866] W. N. 399; 36 L. J. (Ch.) 151.

Now in the present case it is common ground that the time at which this cheque was cleared in fact and the moneys made available for Barclays Bank as agent for Farrow's Bank was 12.30 on Monday, December 20. Farrow's Bank, however, had stopped payment, if not on Saturday or Sunday certainly in the early hours of Monday morning, and long before 12.30 in the day. That being so it seems to me that after ceasing to act as a going concern and stating their intention no longer to act as a going concern they had no longer any authority from Voyce to take what was in fact his money received after the stoppage and convert it into money forming part of their assets, in respect of which they would be entitled to assume the position of debtors instead of agents. On that short ground I am of opinion that these moneys never were in fact collected by Farrow's Bank at a time when they were entitled to claim them as part of their assets.

The result is that there must be a declaration on this summons that the liquidator must pay out of the assets the full amount of the cheque in question.

G. R. A.

C. A.

The liquidator appealed. The appeal was heard on October 19, 1922.

Topham K.C. and *Lionel Cohen* for the appellant.

Micklem K.C. and *Bischoff* for the respondent.

On the appeal the only question argued was whether, assuming Farrow's Bank received the cheque as agents for collection, the relation between the bank and Voyce had become that of debtors and creditor before the stoppage of the bank. The arguments on this point were the same as those used in the Court below.

LORD STERNDALE M.R. This is an appeal from a judgment of Astbury J. on a question arising in the liquidation of Farrow's Bank in these circumstances. I will take the facts as stated in the affidavit of Mr. Drysdale. "On December 16, 1920, Mr. H. J. Voyce paid into the Birmingham branch of the Bank a cheque for 1493*l.* 15*s.* 2*d.* payable to him or his order and drawn on the London Joint City and Midland Bank, West Bromwich. On the same day the Birmingham branch remitted this cheque with others amounting altogether to 2310*l.* 19*s.* 2*d.* to Barclays Bank, Fenchurch Street, for clearance," the meaning of that being that Farrow's Bank are not one of the clearing banks, but employ as their clearing agents Barclays Bank. "On December 17, 1920, Barclays Bank received these cheques for clearance and gave credit for 2310*l.* 19*s.* 2*d.* to the head office of Farrow's Bank on the clearance sheet for that day. Such credit was given subject to recourse in the event of the non-payment of the cheques." There is nothing to show any communication between Barclays Bank and Farrow's Bank with regard to that, but I shall assume that Farrow's Bank would know that Barclays Bank would give them credit in that way for all cheques received upon the clearance sheet. "On the same day Barclays Bank passed these cheques through the Clearing House and the said cheque for 1493*l.* 15*s.* 2*d.* was taken up by the London Joint City and Midland Bank who posted it to their West Bromwich branch the same day. On December 18, 1920 (which was a Saturday), the West Bromwich branch received the cheque and after ascertaining that the drawer had funds to meet the cheque debited the drawer's account and credited their head office with the amount and on the same day they sent an advice to their head office that the cheque was cleared." That, of course, cannot be quite an accurate statement, the cheque was not cleared until it had been cleared at the clearing house; what is meant is that the cheque was good and would be met. "On December 20, 1920 (being the day on which the petition in this matter was filed), the London office of the London Joint City and Midland Bank received the advice from their branch and settled with Barclays Bank through the clearing house and on the same day Barclays Bank advised the head office of Farrow's Bank that the said cheques comprising the total of 2310*l.* 19*s.* 2*d.*

were cleared." What takes place at the clearing house is set out in the affidavit of Mr. Sykes, the secretary of the Institute of Bankers, and all that it is necessary to read with regard to this matter I think is para. 4: "At the Clearing House a cheque is said to be cleared when the final settlement between the banks is made by a transfer in the books of the Bank of England. This takes place as follows:" then he deals with the town clearing, which I need not trouble about. Then: "In the case of cheques drawn on banks in the country cheque clearing on the second day after the cheque reaches the Clearing House. . . . . In all the above cases the settlement is made at the end of the day immediately after the last hour for receiving 'returns.' . . . . In the case of the country cheque clearing, the final agreement of the balance to be paid is made at 12.30 o'clock of the day on which the payment is to be made by transfer at the Bank of England (Saturdays 11 o'clock)."

The question is when did Farrow's Bank receive this money? If they received it before they suspended payment, they then held the money simply in the relation of debtors to their customer; if they did not receive it till after the suspension, they had then given up all their functions as a bank, and they had no right to receive the money and retain it, and the customer would be entitled to recover it. There was a question raised whether Farrow's Bank received the cheque as holders or simply as agents for collection. The learned judge below has decided that they held it only as agents for collection, and no appeal is brought before us against that decision. I should mention that in spite of their so holding it they had in their books credited the customer with the amount of the cheque on the day that it was received, but there is on the paying-in slip a note that although the bank do that they reserve to themselves the right not to allow any drawing against the cheque and not to allow it to be treated as cash until it is cleared.

I shall first deal with the matter as if Farrow's Bank were themselves a clearing bank and had themselves done all that Barclays Bank did for them. In that case it seems to me that the money is not received by them and their capacity does not therefore change from that of agents to a principal to debtors to a creditor until the transfers have been made at the Bank of England, as stated by Mr. Sykes. All that was done upon the Saturday by the West Bromwich branch of the London Joint City and Midland Bank in accepting a cheque as one that they would honour and so informing their head office was done merely for the purpose of enabling the clerk of the head office of the London Joint City and Midland Bank, when the final balance came to be settled between that bank and the bank which had brought the cheque to the clearing house, to deal with the cheque as one that came through the clearing house. In the hypothetical case of Farrow's Bank being a clearing bank the payment was not in fact, in my opinion, made until the transfer at the Bank of England, which placed that money at the disposal of Farrow's Bank. Therefore, it seems to me to be quite clear that the learned judge was right, if Farrow's Bank had been a clearing bank and this matter had been carried through by them without an agent.

But then there is another point which is raised and that is this, that although Barclays Bank, who were a clearing bank and who brought this cheque to the clearing house, may not have received the money until Monday, December 20, Farrow's Bank, their principals, had received the money before that date, that is on the 18th, or perhaps earlier when Barclays Bank credited them with recourse in their, Barclays', books or in the clearance sheet. If the meaning of that credit is that on the credit being given Farrow's Bank were entitled to draw against that amount so credited by Barclays Bank or to deal with it for any purpose at that time, then I think there would be a very great deal to be said for that argument. The argument is put in this way: it is said that this was an absolute credit except that there was a right in Barclays Bank of recovery if the cheque was dishonoured, that as the cheque was not dishonoured it was an absolute credit, and, therefore, it was a payment to Farrow's Bank on that day. I think in order to establish such a point as that we should require a very great deal more evidence as to the dealings between Farrow's Bank and Barclays Bank with regard to this matter than we have before us at present. It is said that we must treat what was done as stated by Mr. Drysdale—namely, that Barclays Bank gave credit to Farrow's Bank and that such credit was given subject to recourse in the event of the non-payment of the cheques, as being the same thing as Barclays Bank handing the amount in cash to Farrow's Bank, so that the latter could do what they liked with it, Barclays Bank simply reserving to themselves the right to get the amount back again in case of the non-payment of the cheques. I do not think there is anything like sufficient material here for us to say that a point like that is established. It seems to me that on the materials we have there is no ground for saying that the credit given by Barclays Bank to Farrow's Bank with regard to that cheque was anything more than the credit given by Farrow's Bank to their customer Mr. Voyce, and that there is nothing to show that the agents intended to pay the principals before they, the agents, were themselves paid. I do not say whether or not on further or better materials such a point could be established, but there certainly is nothing before us to establish it. I think, therefore, that the decision of the learned judge was right and that the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion, and if I were to give a judgment of my own I should repeat in practically the same words the judgment of the Master of the Rolls. I think, therefore, it is unnecessary to add anything.

YOUNGER L.J. I entirely agree.

Appeal dismissed.

Solicitors for appellant: *Lawrance, Webster, Messer & Nicholls.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Mathews, James & Crosskey, Birmingham.*

W. I. C.

C. A.

1922

June 26, 27 ;
July 31.

In re RUSH.

WARRE *v.* RUSH.

[1921. R. 1954.]

Alien—Married Woman—Marriage Settlement—Reversionary Life Interest in settled Funds in England—Restraint on Anticipation—German National —Statutory Charge—Treaty of Peace Order, 1919, *s.* 1, *sub-s. xvi.*

Where property settled upon a married woman for her separate use is subject to a restraint on anticipation, the restraint is not a mere personal liability attaching to the married woman, but is a condition of the trust under which she takes her interest, and as such it cannot, any more than any other condition of the trust, be destroyed, except by the express words of some statutory enactment or by necessary implication, and, except in such case, any charge upon that interest must be subject to the restriction under which she takes the interest.

The Treaty of Peace signed at Versailles on June 28, 1919, came into force on January 10, 1920.

By s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919 (which has effect as a statutory enactment), it is provided that "all property, rights and interests" within His Majesty' Dominions or Protectorates belonging to German nationals at the date when the Treaty came into force (with an immaterial exception) and the net proceeds of their sale, liquidation or other dealings therewith are thereby charged with the payments therein mentioned.

On January 10, 1920, the appellant, a German national, was entitled under her marriage settlement to a reversionary life interest in certain funds in England which were settled upon her for her separate use without power of anticipation. She was then and still was under coverture :—

Held, that although the Order created a charge upon her interest under the settlement it created it only upon the interest as it then existed—namely, subject to the restraint on anticipation—and that there was therefore no effective charge which operated to deprive her of the instalments of income when they became due.

Decision of Russell J. [1922] 1 Ch. 302 reversed.

Appeal from the decision of Russell J. (1)

The facts are fully stated in the report of the case in the Court below.

The present appeal related solely to the question whether the reversionary life interests in the settled funds to which Mrs. Marie Louise Wolf was on January 10, 1920, and still

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(1) [1922] 1 Ch. 302.

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was entitled under her marriage settlement, were charged by the Treaty of Peace Order, 1919.

Mrs. Wolf, although actually born in Germany, was herself, as the daughter of a natural-born British subject, of British nationality until 1901, when she intermarried with her present husband, Carl Philipp Jacob Wolf, who was then and still was a German national. By the settlement executed on the marriage, which was dated August 12, 1901, and framed in the form of an English settlement, the trustees were directed to pay the income of the trust fund thereby settled "to the wife during her life for her separate use without power of anticipation when married."

The Treaty of Peace signed at Versailles on June 28, 1919, came into force on January 10, 1920. By s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919 (which has the effect of a statutory enactment), it is provided that "all property, rights and interests" within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty came into force (with an immaterial exception) and the net proceeds of their sale, liquidation or other dealings therewith are thereby charged with the payments therein mentioned. The trust funds comprised in the settlement were in this country.

Russell J. held that the fact that Mrs. Wolf was restrained from anticipation was no ground for holding that her reversionary rights to receive the income of the different funds, which were vested in her on January 10, 1920, were not "property, rights and interests" belonging to her within the meaning of the words in s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919, or that the statutory charge only attached if, and to the extent that, a German national was capable of creating a charge. He accordingly held that the life interest of Mrs. Wolf under her marriage settlement of 1901 was charged by the Order.

Mrs. Wolf appealed. The appeal was heard on June 26, 27, 1922.

Greene K.C. and *H. J. Wallington* for the appellant. On January 10, 1920, when the Peace Treaty came into force,

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Mrs. Wolf's contingent reversionary life interest in the property settled upon her for her separate use under her marriage settlement was subject to a restraint on anticipation. A restraint on anticipation is a fetter or incumbrance on the property itself and is not a personal incapacity attaching to the married woman. It owes its validity and existence entirely to the terms of the trust and is a qualification of the separate use and to that extent diminishes the property. The nature of a restraint on anticipation is explained in *Tullett* v. *Armstrong* (1); *Robinson* v. *Wheelwright* (2); *Hood Barrs* v. *Heriot.* (3) It follows that to interfere with the restraint on anticipation would be to alter the nature of the property itself and the language of the trust by which the restraint was created. Russell J. has treated the case as one of incapacity analogous to that of infancy and lunacy. This it is submitted is incorrect. Whenever a statute is intended to affect the restraint it does so in express terms: see for example Conveyancing Act, 1881, s. 65, sub-s. 2; Settled Land Act, 1882, s. 61, sub-s. 6; Trustee Act, 1893, s. 45. To override a restraint would in effect be to vary the trust of the instrument under which it was created, and this the Court has no power to do: *Loraine* v. *Loraine and Murphy.* (4) If the property in the present case is taken under the Peace Order, the result will be to alter the terms of the trust instrument. In *Axford* v. *Reid* (5), in which it was held that a married woman's property, though subject to a restraint on anticipation, was liable to satisfy her ante-nuptial debts, the decision turned on the construction of the words "as if she had continued unmarried" in s. 12 of the Married Women's Property Act, 1870. Under the Bankruptcy statutes what vests in the trustee on the bankruptcy of a married woman is her separate estate, subject to the restraint on anticipation: *In re Wheeler's Settlement Trusts.* (6) In the case of a life interest in English property given by the will of a domiciled Englishman

(1) (1838) 1 Beav. 1, 21, 32.
(2) (1855) 21 Beav. 214, 220.
(3) [1896] A. C. 174.
(4) [1912] P. 222, 227.
(5) (1889) 22 Q. B. D. 548, 552.
(6) [1899] 2 Ch. 717.

for the separate use of a married woman without power of anticipation, the nature and extent of her interest does not vary according as her domicil is or is not English. The trust will be recognized by the English Courts as valid and operative, even though by the law of her domicil neither the separate use nor the restraint on anticipation is recognized: *In re Fitzgerald.* (1) This shows that the restraint is not a mere personal disability.

The Treaty of Peace Order, 1919, was intended to carry out the provisions of the Peace Treaty and must be construed according to English municipal law. "International Law cannot give municipal rights to individuals, for municipal rights and duties can only be created by Municipal Law": Oppenheim's International Law, 3rd ed., vol. i., Peace, pp. 459, 677. The Order should be construed solely as a municipal statute and too wide a construction should not be given to it. The Order is directed to dealing with the property of German nationals in this country as it existed on January 10, 1920, and to handing over to the custodian exactly what the German nationals then had and nothing more. What Mrs. Wolf then had was the interest in question subject to the restraint on anticipation, and it is submitted that the Order gives no overriding charge which will deprive her of the instalments of income as they become due.

Ashworth James for the trustees of the settlement.

Clauson K.C. and *Gavin T. Simonds* (*Sir Ernest Pollock A.-G.* with them) for the Public Trustee, as custodian of enemy property in England and Wales. It is submitted that the decision of the learned judge was right. The settlement being an English settlement the rights of Mrs. Wolf must be determined in accordance with English law: *Montgomery* v. *Zarifi.* (2) The law as to releasing the restraint on anticipation is correctly stated in Halsbury's Laws of England, vol. xvi., § 752, p. 375, as follows: "An unmarried woman or widow, entitled to property subject to a restraint on anticipation, may discharge the property from the restraint by any alienation or disposition thereof which is inconsistent

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(1) [1904] 1 Ch. 573, 589.

(2) 1918 S. C. (H. L.) 128.

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with the continuance of the restraint, or by actually receiving the property and treating it as her own absolute property, or by a deed releasing the property from the restraint and declaring her intention to hold or enjoy it discharged therefrom": see also *In re Chrimes.* (1) That states the question in a nutshell, and is a convenient summary of the law, as to which there is no question. The exact point which arises in this case is this. By the Treaty of Peace Order, 1919, a charge is imposed on all property in this country belonging to German nationals which has priority over every other charge. That charge is a statutory overriding charge. It takes the property of Mrs. Wolf to the full extent of her interest in it and removes by its own force the restriction imposed on her enjoyment of it.

In *In re Fitzgerald* (2) the restriction on the property of the married woman was of such a character as prevented her dealing with the property. It is not correct to say that a restraint on anticipation is something which attaches to the property itself; it is something which affects the power and capacity of the married woman to deal with it and is different from a restriction which prevents it being taken away from her. The question is, is this "property, or interest," belonging to Mrs. Wolf within the meaning of the Treaty of Peace Order? It is submitted it is. Although she was restrained from anticipation yet the life interest in the income under her marriage settlement when the Treaty came into operation belonged to her. The fetter on her right to deal with the income was one personal to herself and was destroyed by the charge. There is nothing in the Order which would protect the property of a German national which is subject to a restraint on anticipation, and such protection is opposed to the whole object of the Order. It is said that some assistance is afforded the Court by the provisions of certain statutes as to removing restraint on anticipation, but it is submitted that these provisions have really little to do with the matter. The two statutes on which there is authority are (1.) the Married Women's Property Act, 1870, s. 12—*Axford* v. *Reid* (3)—

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(1) [1917] 1 Ch. 30.

(2) [1904] 1 Ch. 573, 589.

(3) 22 Q. B. D. 548.

and (2.) the Married Women's Property Act, 1882, s. 19: *In re Wheeler's Settlement Trusts.* (1) *Axford* v. *Reid* (2) supports the view that the reversionary interest of Mrs. Wolf was "property" belonging to her within the meaning of the Peace Order, notwithstanding the existence of the restraint on anticipation, and is an authority that the word "property" is not to be limited in the way contended for. In *In re Wheeler's Settlement Trusts* (1) there were both kinds of property, that on which there was a restraint on anticipation and that on which there was no restraint, and both would have been placed on the same footing but for s. 19 of the Act of 1882. It was there held that the effect of s. 19 was to preserve the interest of the married woman in the property subject to the restraint on anticipation so long as she remained under coverture, notwithstanding her bankruptcy.

The Order does not say that there shall be a statutory assignment of the property, but that there shall be a charge imposed upon it. The case is analogous to that of a charge imposed by a local authority for the expenses of making up a road upon property the subject of a settlement which would have priority over all interests under it and would be unaffected by the fact that the owner was a married woman restrained from anticipation. The fact here that Mrs. Wolf is unable to deal with her life interest is wholly immaterial so far as the Order is concerned. It is submitted therefore that this is "property" which is the subject of the Order and that the charge imposed upon it must be discharged before Mrs. Wolf can receive anything from it.

Greene K.C. in reply. The Order says nothing about the charge being an overriding charge on the property. The words are "shall be charged upon." There is no reason for extending the words of the Order.

Cur. adv. vult.

July 31. The following written judgments were delivered :—

LORD STERNDALE M.R. The facts of this case appear in the report of the proceedings before Russell J. from whose

(1) [1899] 2 Ch. 717.

(2) 22 Q. B. D. 548.

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decision the appeal is brought.(1) It contains facts relating to questions concerning persons other than Mrs. Wolf, but only those concerning her are relevant to this appeal.

Mrs. Wolf is a German national, and the question is whether her interest in the property in settlement is charged by virtue of the Treaty of Peace Order, 1919, and if so, whether such charge overrides or gets rid of the restraint on anticipation. The operative part of the Order in Council is s. 1, sub-s. xvi., which is as follows: "All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged" with certain payments as set forth in clauses (*a*) and (*b*) thereof. Mrs. Wolf undoubtedly has an interest in the funds settled, and I agree with Russell J. that the beneficial interest in the income is in her and in nobody else. But it is in her subject to the restraint on anticipation, which prevents her from dealing with it in any way except as each instalment becomes due. If this restraint were only a personal disability, I should agree with the decision of the learned judge that in spite of it the Order in Council creates a charge which would operate upon the whole of the income, although Mrs. Wolf could not herself have created such a charge. But I do not think it is a mere personal disability. The nature of the restraint is discussed by Cozens-Hardy L.J. in *In re Wheeler's Settlement Trusts* (2); *Axford* v. *Reid* (3); *Loraine* v. *Loraine and Murphy* (4); and other cases to which we were referred; and in my opinion, those cases show that such a restraint is not a mere personal disability, but is a part of the trust under which the married woman takes her interest and that as a part of the trust it cannot, any more than any other part of the trust, be destroyed except by express words or by necessary inference, and that except in such a case any charge upon that interest must be subject to the restrictions

(1) [1922] 1 Ch. 302.
(2) [1899] 2 Ch. 717.
(3) 22 Q. B. D. 548.
(4) [1912] P. 222.

under which the married woman takes the interest. In the case of the statutes to which we were referred—that is, the Conveyancing Act, 1881, s. 65; the Settled Land Act, 1882, s. 61; the Married Women's Property Act, 1882, ss. 5 and 19; and the Trustee Act, 1893, s. 45—the restraint was affected by the plain terms of the Act. There are no such words in the Order in Council, and I cannot agree with Russell J. that the object of it and of the Treaty distinguishes it from those Acts so as to dispense with the necessity of plain terms or to create a necessary inference that it was intended to override the restraint. I think, therefore, that though Mrs. Wolf has an interest in the income, and though the Order in Council does create a charge upon that interest it only creates a charge upon it as it exists, that is, restrained from anticipation, and that, therefore, there is no effective charge which operates to deprive Mrs. Wolf of the instalments of the income when they become due.

I think, therefore, the appeal should be allowed, and the order will be as stated in the judgment of Warrington L.J.

WARRINGTON L.J. On January 10, 1920, the day of the coming into force of the Treaty of Peace between this country and Germany, the appellant, Marie Louise Wolf, a German national, was entitled to a reversionary life interest restrained from anticipation in certain property in this country. The appellant was then and is now under coverture.

By the Treaty of Peace Order, 1919, which it is admitted has the force of a statute, all property, rights and interests within His Majesty's dominions belonging to German nationals at the date when the Treaty came into force (with an immaterial exception) and the net proceeds of their sale, liquidation, or other dealings therewith, were charged with certain payments. The question is whether the charge affects the life interest of Mrs. Wolf, notwithstanding the restraint on anticipation. Russell J. has declared that the life interest of the appellant is subject to the charge; his view, in other words, is that the statutory charge created by the Order overrides altogether the restraint on anticipation. There can, I think, be no real dispute that the restraint on anticipation is not a personal incapacity arising from the fact that the owner of the property is a married woman, but that it arises from the terms of the trust or contract by virtue of which she becomes entitled to the property. It is also settled law that it has effect only during coverture. If coverture ceases the restraint is removed for the time and the woman has full power of disposition. If she again comes under coverture then unless during her discoverture she has disposed of her interest, the restraint revives, but subject to any partial disposition made by her while discovert.

The question is: Does the charge created by the Order override the terms of the trust under which the appellant holds? It is quite true that the charge is a statutory charge, and it was therefore competent for those who made the Order to give it the effect which the learned judge thinks it has. The question is, have they done so? It is also true that the beneficial ownership of the income is in the appellant and in no one else; but it is in her subject to the qualification that during coverture it shall not be capable of alienation.

In my opinion there is nothing in the Order in Council which exempts such charge, if any, as is created thereby from being subject to the qualification above mentioned, and, therefore, during Mrs. Wolf's present coverture at all events the restraint on alienation remains effective and the income remains payable to her notwithstanding the provisions of the Order.

It may be that should her present coverture cease during her life the charge may then become effective, but this question does not now arise for decision, and I express no opinion upon it. On the point on which I do express an opinion I think my view receives some support from this, that no statute has been cited or referred to which has overridden the conditions under which property is held except by express terms or by necessary implication; and in the case of this particular condition it would appear either that where it was overridden by a general provision it was restored by a specific enactment (Married Women's Property Act, 1882, s. 19), or that where it was intended to override it words were inserted to put this beyond dispute: see Conveyancing Act, 1881, s. 65; Settled Land Act, 1882, s. 61; and Trustee Act, 1893, s. 45.

In my opinion the order of the judge should be varied by omitting the item No. 2 from the list of interests declared to be subject to the charge and adding that this order is to be without prejudice to any question which may arise as to the life interest of the defendant Marie Louise Wolf in the event of the cesser of her present coverture in her lifetime. I think she has substantially succeeded. The costs cannot properly be paid out of capital, as they were ordered to be paid in the Court below; I think the appellant's costs should be paid by the Public Trustee; he should have no costs, and those of the plaintiffs' who are trustees should be paid out of the funds of which they are trustees.

YOUNGER L.J. The appellant, Mrs. Wolf, is, and was on January 10, 1920, entitled under her marriage settlement to a reversionary life interest in certain settled funds, the trust in her favour being thus expressed: "The trustees or trustee shall pay the income of the trust fund to the wife during her life for her separate use without power of anticipation when married." Mrs. Wolf, although actually born in Germany, was herself, as the daughter of a natural-born British subject, of British nationality until in 1901 she intermarried with her present husband, Carl Philipp Jacob Wolf, who was then, and still is, a German national. It was on the occasion of her marriage that the settlement above referred to, framed in the form of an English settlement, was executed. It bears date August 12, 1901.

The only question on this appeal—other questions were decided by Russell J. at the hearing of the summons and are not under appeal—is whether the interests of the appellant Mrs. Wolf in these settled funds so far as they may accrue to her after January 10, 1920, are charged by the clause in the Treaty of Peace Order, 1919, which has been set forth by the Master of the Rolls in his judgment.

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The relation in which that Order stands to the Treaty of Versailles was discussed by this Court only the other day in *Kramer* v. *Attorney-General* (1), and upon that point there was no difference of judicial opinion. My own judgment upon it is that, although in the last analysis the question whether in any particular case this charge does or does not attach depends upon the true construction of the Order in Council alone, the Court is under that Order entitled if not indeed invited in aid of construction to look at the sections of the Treaty which are by the Order given the force of law as well as at any others calculated to throw light on the meaning of any relevant expressions in these sections. As, however. the right of charging the property of German nationals within their respective territories reserved by the Allied and Associated Powers under s. 297 of the Treaty is a facultative right only which any Allied and Associated Power is free to exercise or not to exercise and either in whole or in part as to that Power may seem expedient, it follows that the terms of the Treaty may be wide enough to authorize a charge which whether as to property or as to classes of persons or even as to individuals goes far beyond any charge in the event ultimately made effective by the municipal law of the Power concerned. The actual charge imposed by the Order here may therefore fall far short of one authorized by the Treaty. But the actual charge will certainly not consciously exceed the authorized charge, and that not only because an Allied and Associated Power would not presumably go beyond the limit it had set for itself in the reservation but also for the following reason very potent in the present connection.

When the then existing law and practice of this country in such matters is considered, I allude to it more specifically later on, it must in my judgment be taken to have been of the essence of the reservation that Germany did by sub-s. 1 of s. 297 of the Treaty agree with the Allied and Associated Powers to make compensation to her dispossessed nationals in respect of any charge actually levied upon their property, rights and interests under the liberty reserved to those Powers. In construing the terms of the Treaty of Peace Order accordingly it becomes very material to ascertain the extent of the charge authorized by the Treaty if only for the reason that regard being had to the existing law and practice in this country on this subject it may with confidence be affirmed that no charge would thereafter be imposed by any British legislative enactment, at least, of intention, upon any British property, rights or interests of a German national to which the obligation imposed upon Germany to make compensation did not extend and none the less so that in the event that obligation may have become inadequate.

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(1) [1922] 2 Ch. 850.

For the purpose therefore of ascertaining the extent of the liberty reserved to the Allied and Associated Powers in this matter I look at the Treaty of Versailles, and s. 297 is, I think, the only section to which reference need be made. There we find the authority for the charging clause of the Order with which we have here to deal. By sub-s. (*b*) of that s. 297 the "Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals . . . . within their territories." The liquidation is to be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner is not to be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State. By sub-s. (*c*) the price or the amount of compensation in respect of the right referred to in the preceding sub-s. (*b*), is fixed in accordance with the method of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated. And by sub-s. (*i*) we have the undertaking already referred to by which Germany binds herself to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.

Now it will be noted, first of all, with reference to these provisions that the property, rights and interests, the subjects of reservation, are described in quite general terms. That is to say, there is no specific reference to such a peculiar class of proprietary interest as the separate estate of a married woman which she is restrained from anticipating, a species of interest probably unknown to the legal system of any Allied or Associated Power other than Great Britain and the United States of America. Again there is no limitation in the expression "German nationals." Is there in these circumstances any ground for holding that the property affected is limited to that of German nationals of legal capacity to dispose? Must it extend also to the property of German nationals who are infants or lunatics or otherwise under disability? Now as I have said the introductory words are not limited in either respect, but there is a subsequent provision in the section which would seem to indicate in the framers of it some sort of design to limit its operation in both. Sub-s. (*b*) indicates with reference to property that the framers of the reservation had in mind, primarily at all events, only such property, rights and interests as might be the subject of sale or valuation according to the laws of the country in which they are existent and such also—and this is the second limitation—as their German owner might validly dispose of or charge if that owner were not by some effective new restraint prohibited from doing so. Now it would, I conceive, be difficult to discover anywhere any interest less a subject of valid sale, disposition or charge than the life interest in English property held to the separate use of a married woman under a restraint on anticipation, or any interest for which adequate compensation could be assessed on a basis less appropriate than that of the sum to be realized from a sale of it in this country.

And the possible implication of the section that it does not touch the property of infants and lunatics or those under disability of disposition is not displaced by further inquiry. The taking of any private property on land of a former enemy national at the conclusion of peace is an entirely new departure. Its justification may in these democratic times have been found in the conception that the nationals of a

Power may be associated with the transgressions of their government. Amongst such nationals, however, one would be bold to include infants and lunatics, and I am not sure that, even in these days of female emancipation, the English mind is so completely acclimatised as naturally to include within them a woman under the disability of coverture and as to her property restrained from anticipating its enjoyment. Be all that, however, as it may, the law of this country as it stood when the Treaty was signed, and as it stands to-day (and I am not aware that in this respect the law is different in any Allied country) is all in favour of the view that such a reservation as that with which we are here dealing should and would be framed on the strictest lines. A state of war is not by the common law of this realm permitted to affect title or enjoyment of their property by resident enemy nationals even while the state of war continues. If such title or enjoyment is to be affected it must be done by emergency legislation passed during the continuance of the war. And with regard to the restoration of such property to its owners resident in enemy territory after peace, upon that subject there is by the law of this country no doubt or question. Its cardinal principles were frequently reaffirmed during the late war itself in deliverances of the highest authority. "Subject to any legislation to the contrary," said Lord Parker, in *Daimler Co.* v. *Continental Tyre and Rubber Co. (Great Britain)* (1), in the course of a speech concurred in by Lord Mersey, Lord Kinnear and Lord Sumner, "or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war." Again in *Hugh Stevenson and Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (2), Lord Finlay in 1918 said: "It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the

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(1) [1916] 2 A. C. 307, 347.

(2) [1918] A. C. 239, 244.

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meantime." And lastly, Lord Birkenhead, in *Fried Krupp Aktiengesellschaft* v. *Orconera Iron Ore Co.* (1), in 1919 observed: "It is a familiar principle of English law that the outbreak of war effects no confiscation or forfeiture of enemy property." We approach therefore the consideration of this Order in Council with no instruction from the Treaty itself and with no warrant from existing law and practice, certainly in this country, to place upon its provisions any construction other than that which they strictly bear. We do, however, I think, obtain this light from s. 297, that the Allied and Associated Powers were at least not consciously reserving power to appropriate an interest of such a kind that the measure of compensation exacted from Germany on the basis prescribed by the Treaty could be no adequate return for the value of the property if appropriated. More especially is this true of Great Britain in relation to such an interest as the appellant's, because, as a moment's consideration will show, the German nationals entitled to such an interest must, with quite insignificant exceptions, be like Mrs. Wolf—British-born women whose property has been settled on marriage, or at least married women of British origin or descent whose interests are derived from a British settlor or testator.

Now, of course, the appellant, on her marriage, became a German national. She ceased then to be a British subject. She became an alien and on the outbreak of war an enemy alien. Even so, however, her property in this country was secured to her by statutory title. Sect. 17 of the British Nationality and Status of Aliens Act, 1914, reproducing s. 2 of the Naturalization Act, 1870, enacts with exceptions not here material that: "Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject." The position accordingly is that her property in this country is secured to the appellant by statute and it can only be taken away by some statute or Order having the force of a statute. Now the Order with

(1) (1919) 88 L. J. (Ch.) 304, 309.

which we are here concerned itself provides no compensation, as I endeavoured to explain in *Kramer* v. *Attorney-General* (1), and it is a proper rule sanctioned by unbroken usage not to construe a statute as confiscating property or as interfering with or injuring individual rights without compensation, unless one is obliged so to construe it, and that rule which requires in such a case either express words or clear implication placing the matter beyond reasonable doubt applies, I cannot doubt, with equal force to the question whether particular property or particular interests of particular persons are so interfered with or affected. Accordingly, for my own part, I am not prepared to approach the consideration of this question under the Order from the standpoint adopted by the learned judge, when, in his judgment, speaking of the Peace Order, he says (2): "Its declared aim and object is to charge on property, within His Majesty's dominions and protectorates, which belongs to German nationals, compensation in favour of this country which has to be borne by their country. Such a charge should prima facie apply to all German nationals whose property is here; and I am not prepared to except from it the property of any German national unless compelled to do so by clear and express words in the Order, and none such are to be found." With the greatest respect to him, and for the reasons already indicated, I demur to this view, and, if the decision of the learned judge requires for its validity recourse to any such principle of interpretation then it is not in my judgment a decision to be supported. For myself, I am convinced that it is pre-eminently important strictly to adhere to principle in the decision of these Treaty cases.

Coming then to the Order in Council I take leave to observe, first of all, that as the learned judge says in his judgment, if the statutory charge created by the Order is only to attach to the extent that the German national would herself be capable of creating the charge, plainly the Order does not effectively charge in favour of this country the interests of Mrs. Wolf. He disposes of that suggestion, however, in the following words (1): "There is nothing in the language of the Treaty of Peace Order, 1919, or in its aim and objects as disclosed therein, to suggest or warrant the implication of such a proviso, which would indeed exclude from the charge the property of German nationals whose incapacity voluntarily to create a charge arose from infancy, insanity, or other cause."

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(1) [1922] 2 Ch. 850. (2) [1922] 1 Ch. 302, 311.

Now, I have already set forth what, to my mind, are very cogent reasons derived from the terms of the Treaty and from other relevant considerations tending to the conclusion that the charge may by the Order only be intended to be operative with the limitation the learned judge rejects, and I can myself see in the Order itself, exclusive altogether of considerations furnished by the provisions of the Treaty, indications that there is no intention thereby to charge with the liabilities of their Government the property either of married women restrained from anticipation or that of infants and lunatics. It is in this connection not irrelevant to direct attention to the existing provisions of clause xvii. of the Order, whereby, "with a view," as it is stated, "to making effective and enforcing such charge" it is provided (*a*) "no person shall without the consent of the custodian, acting under the general direction of the Board of Trade, transfer, part with or otherwise deal in any property, right or interest subject to the charge, and if he does so he shall be liable on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding three months or to both such imprisonment and fine." Here we have in very forcible shape the prohibition against transfer contained in s. 297 of the Treaty to which reference has already been made. What does this clause import? There is no indication in its terms that apart from the prohibition the transfer, etc., would be ineffective. What then is the conclusion to be drawn? Does the clause mean to exalt into a criminal offence a transfer parting or dealing with the interest of a married woman restrained from anticipation which needs no statutory prohibition to make it entirely inoperative;

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(1) [1922] 1 Ch. 302, 311.

does it mean to do the same service to an equally inoperative transaction by a lunatic or an infant, or is it another indication that no such interests are caught by the charge at all? I leave that aspect of the matter and of the clause there. My decision in this case is not rested on any view that the limitation of the charge rejected by the learned judge is in fact and on construction a true limitation. That view, however, in my opinion, cannot be rejected out of hand as he has rejected it. But I merely here assume without deciding that it is not tenable. Even so the interest as on January 10, 1920, of a married woman in respect of her separate estate which she is restrained from anticipating, is not, in my view, caught by the charge; and my reason for that conclusion is, that the effective restraint upon the anticipation by her at that moment of any future enjoyment is not the result of any disability on her part, but is a condition validly attached to the interest itself by the person, be he settlor or testator, who created it.

Before seeking to justify that statement from the authorities as to the nature of the restraint, I pause to refer to the main argument by which, as I understood Mr. Clauson, he sought in advance to meet it. This charge, he said, was a statutory over-riding charge which, taking the property of its owner for the full extent of her interest in point of duration, eliminated by its own force any restriction on her enjoyment by whomsoever imposed.

Now, in my judgment, there is nothing either in the Treaty or the Order which points to any such conclusion. Such an over-riding charge would not deal with this property of a German national as it is, which alone the Treaty and Order as I read them purport to do. It would alter and enlarge it. Moreover, had such been the nature and effect of the charge, s. xvii. of the Order to which I have just referred for another purpose, would have been quite unnecessary; and the property itself would, I should have thought, have been expressed to be appropriated and not merely to be charged. If the charge is an over-riding charge it is quite unimportant into whose hands the property passes. The charge would follow it; and, in my judgment, it is not without significance that throughout this Order the charge is treated as a charge upon property, rights or interests which is at least endangered if the property, rights or interests so charged be transferred by their German owner to some one with presumably no notice of the charge. It confirms, as I think, the conclusion otherwise reached, that nothing here is charged except the actual property, rights and interests as they existed on the day the charge attached, January 10, 1920.

Now the nature of Mrs. Wolf's interest on that day is very clearly set forth in certain well-known authorities. In *Tullett* v. *Armstrong* (1), for instance, Lord Langdale M.R. says: "If the gift be made for her sole and separate use, without power to alienate, [a married woman] has during the coverture, the present enjoyment of an unalienable estate, independent of her husband. . . . . The restriction cannot be considered distinctly from the separate estate of which it is only a modification; to say that the restriction exists, is saying no more than that the separate estate is so modified; the donor in giving the woman when married, some of the faculties of a feme sole, has withheld the power of alienation; under the terms of the gift, and by the aid of this Court, the woman is a feme sole, as to the present enjoyment of the property, but no further; measuring her faculty by the terms of the gift, she is not a feme sole as to the disposition of her property in anticipation of her intended provision." Again in *Robinson* v. *Wheelwright* (2) we find Sir John Romilly saying of such an interest: "The first testator has thought fit to impose certain fetters on his property, which are sanctioned by the law of England, and which it permits a testator to impose; those fetters remain and make the property in the hands of the devisee or legatee absolutely inalienable for any consideration whatever." And in the same case, Lord Cranworth says, on appeal (3): "The restraint is created by the author of the gift, and the question is whether what is proposed is consistent with the

(1) 1 Beav. 1, 32, 33.
(2) 21 Beav. 214, 220.
(3) (1856) 6 D. M. & G. 535, 545.

terms of his gift." And the effect of a charge upon such an interest created by statute in terms analogous to the charge here is to be found in *Loraine* v. *Loraine and Murphy* (1), a case relating to the Matrimonial Causes Act, 1857. By that statute it is provided that it shall be lawful for the Court where the wife is entitled to any property either in possession or in reversion to order such settlement as it shall think reasonable to be made of such property or any part thereof. Cozens-Hardy M.R. in the case cited where the wife had married again and her property had become subject to a restraint on anticipation, said: "The Court can only look and see what is the interest which the wife takes, and such interest as she takes under that settlement is one which the Court cannot interfere with, and cannot enlarge, curtail or destroy. . . . . We are really asked to alter and interfere with that which is not the creation of the married woman herself, but is a part of the will of her father, under which will, unaltered and untouched, she must take, and alone can take, the interest now in question." "The Court has no power," said Farwell L.J. in the same case, "to make an order which will get rid of that restraint." Lastly, I would refer to *In re Fitzgerald* (2), where, with reference to such an interest as the present, Vaughan Williams L.J. says: "The restriction on chargeability . . . . arises out of the terms of the contract and the trust thereunder. There is no personal incapacity; the wife, ... can claim [no] more under the trust than is given to her . . . . by the trust." And it is as I think by reason of that character or quality of the restraint that where, in an English statute, it is intended by the Legislature that for the purpose in hand, the restraint shall be ignored or removed, it is so enacted in express terms. Three instances of this are given in his judgment by the learned judge; and these may be added to. I would only draw attention to the extreme significance in this behalf of the latest mentioned by him—namely, s. 45 of the Trustee Act, 1893—which indicates that even the general liability of a beneficiary to indemnify out of his interest in the trust estate a trustee who has committed a breach of trust at his instigation or request or with his consent in writing would not have extended to the interest of a married woman entitled for her separate use and restrained from anticipation without express provision to that effect. The learned judge escapes from these statutes only on the ground that the Peace Order stands in a different category of legislation from them, for the reason given by him in the first passage from his judgment here cited and on which I have already commented. I regret not to find myself in agreement with the learned judge on this point. In my judgment these passages cannot in that way be disposed of. In my opinion they show that regarding this Order as a British statutory enactment, a charge upon "property, rights and interests" in this country belonging to any of a class of persons at any particular date is not either apt or effective to charge the interest of a married woman entitled for her separate use and restrained from anticipation.

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(1) [1912] P. 222, 228, 229, 231.

(2) [1904] 1 Ch. 573, 596.

In my judgment, apart from any presumptions in favour of the appellant, the words of the Order are not sufficient to charge her interests: with the benefit of such presumptions as she is, I think, entitled to, the words of the Order are, in my judgment, quite insufficient. Indeed, the order of the learned judge can only, I think, and not even then, be supported on the principle of construction adopted by him. That principle in this case was, in my judgment, inadmissible.

Accordingly I am of opinion that this appeal should be allowed.

For the reasons given by Warrington L.J. I concur in the qualification being inserted in the order as stated by him, but I think it right to say that, as at present advised, the basis on which the decision of this Court rests seems to me to involve that no part of the future interest of the appellant which she was on January 10, 1920, restrained from anticipating can be caught by the charge.

The order will be as stated by Warrington L.J.

Appeal allowed.

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The order as to costs was subsequently varied by agreement between the parties.

Solicitors for appellant: *Cruesemann & Rouse.*
Solicitors for trustees: *Williams & James.*
Solicitors for Public Trustee: *Coward & Hawksley, Sons & Chance.*

W. I. C.

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July 27.

In re GRETTON'S INDENTURE.

In re RATCLIFF AND BRINCKMAN'S TRUSTS. HOOD *v.* LADY BYRON.

[1921. G. 3666.]

Revenue—Income Tax—Super-tax—Annuity bequeathed "free of legacy duty income tax and all other duties"—Similar but smaller Annuity substituted and secured by Deed—Payment in full without allowing Deduction—Void Agreement—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 103—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *General Rules, Sch. I., r.* 23, sub-r. 2.

A deed of compromise, made in 1883, whereby an annuitant agreed to take an annuity of 5000*l.* "clear of legacy duty, income tax and all other duties whatsoever" in lieu and satisfaction of an annuity of 6000*l.* bequeathed to her by will "free of legacy duty income tax and all other duties," and also agreed for the ensuing period of five years to waive and release the right given to her by the will to call upon the trustees thereof to purchase such an annuity in her name, does not offend the provisions of s. 103 of the Income Tax Act, 1842, now replaced by r. 23, sub-r. 2, of the General Rules in the First Schedule to the Income Tax Act, 1918; but where the deed went on (1.) to empower (which power was duly exercised) the residuary legatees and next of kin within five years thereafter to purchase or transfer into the names of other trustees, to be then chosen, a sum of Government stock sufficient to provide by the interest or dividends thereof the annuity of 5000*l.* and the tax and duties thereon up to a total of 5300*l.* per annum, to be held by the trustees in trust in the first place to pay the said annuity tax and duties and subject thereto as part of the residuary estate of the testator, and (2.) to provide that on such purchase or transfer the right of the annuitant to call upon the trustees of the will to purchase an annuity was to cease and determine, and that such right should, on request, be released by the annuitant, and that after such purchase or transfer the annuity of 5000*l.* and the tax and duties thereon should be payable exclusively out of the income of the fund so purchased or transferred, and in case

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of deficiency out of the capital, the remainder of the testator's estate being absolutely released and exonerated from the annuity and all claims and demands in relation thereto :—

Held, that the effect of the later provisions of the deed, when resorted to, was to secure to the annuitant an annuity no longer derived under the will alone, but depending upon an agreement which was in direct violation of s. 103 of the Income Tax Act, 1842, and was therefore void; and that the annuitant was not entitled to have the annuity of 5000*l.* paid to her free of either ordinary income tax or super-tax.

ADJOURNED SUMMONS.

By his will dated August 26, 1882, Frederick Gretton gave, devised, and bequeathed unto the defendant Lady Byron (then Fanny Lucy Radmall) the clear yearly sum or annuity of 6000*l.* British sterling per annum during her life free of legacy duty, income tax, and all other duties whatsoever and directed his trustees at any time (if Lady Byron should so desire it) to lay out a sufficient portion of his estate in the purchase of such an annuity as aforesaid in her name either from the Commissioners for the reduction of the national debt or from any insurance or other public company or corporation approved of in writing by her, the said annuity to be paid quarterly and the first quarterly payment thereof to be made at the end of three months next after his decease.

Subject (inter alia) to the said annuity, the testator gave, devised and bequeathed all his estate and property both real and personal unto and equally between his two sisters Frances Gretton and his sister Clara Gretton.

The testator died on November 15, 1882, leaving surviving him his brother John Gretton his heir at law, and the said John Gretton, his two sisters Frances and Clara Gretton and another sister, Mrs. Mary Wigan, his sole next of kin. After the testator's death questions arose as to the validity of the said will, and, after an arrangement had been made for satisfying any claims that Mrs. Mary Wigan might have, the brother and the other two sisters of the testator came to terms with Lady Byron in respect of her annuity. Accordingly by an indenture dated February 14, 1883, and made between John Gretton of the first part, Frances Gretton of the second part, Clara Gretton of the third part, and Lady

Byron (by her then name of Fanny Lucy Radmall) of the fourth part, after reciting (inter alia) that the said John Gretton, Frances Gretton, and Clara Gretton had threatened to contest with Lady Byron the validity of the testator's will, and that to prevent any litigation and to compromise and settle all questions between the parties thereto in reference to the rights of Lady Byron under the will and in the estate of the testator, Lady Byron, while insisting that the will was a good and valid testamentary disposition in all respects, had agreed to the arrangement thereinafter contained, it was witnessed as follows: "(1.) In lieu and satisfaction of the annuity of 6000*l.* by the said recited will given to her the said Fanny Lucy Radmall will accept an annuity of 5000*l.* clear of legacy duty income Tax and all other Duties whatsoever which said annuity shall be received by her out of the estate of the said Frederick Gretton as mentioned in the said Will or out of the shares of the said estate as hereinafter mentioned but nothing herein contained shall be taken to impose any personal liability on the said Frances Gretton and Clara Gretton or either of them to pay the said annuity or any part thereof the said annuity shall accrue as from the 15th day of November, 1882, and be payable quarterly . . . . And the said Fanny Lucy Radmall will for the period of five years from the day of the date hereof waive and release the right by such Will given to her of calling upon the Trustees thereof to purchase the annuity thereby provided for her or any part thereof." "(2.) Provided always and it is hereby agreed and declared that it shall be lawful for the said Frances Gretton Clara Gretton and John Gretton or any or either of them or their or any or either of their executors or administrators at any time within the period of five years from the day of the date hereof to purchase or transfer into the names of two Trustees the one to be chosen by the person or persons making such purchase or transfer and the other by the said Fanny Lucy Radmall such a sum of Stock of the Government of Great Britain the interest or dividends whereof will amount to the total of the said annuity of 5000*l.* and the tax and duties thereon as aforesaid say 5300*l.* And the said Trustees shall hold the said Stock in trust in the first place to pay the said annuity tax and duties and subject thereto as part of the residuary estate of the said Frederick Gretton."

Clause (4) was in these terms: "Provided further that if such purchase or transfer as aforesaid shall be made within the said period of five years then the right by the said recited Will given to the said Fanny Lucy Radmall to call upon the Trustees thereof to purchase an annuity shall absolutely cease and determine and the said Fanny Lucy Radmall will if the persons or person making such purchase or transfer shall so require and at their his or her expense execute a release of such right and after such purchase or transfer the said annuity of 5000*l.* and the tax and duties thereon as aforesaid shall be payable exclusively out of the income of the funds purchased or transferred or if such income shall be insufficient then out of the corpus thereof and after such purchase or transfer the remainder of the estate of the said Frederick Gretton shall be absolutely released and exonerated from the same annuity and from all claims and demands in relation thereto."

Clause (5) was: "The said Frances Gretton and Clara Gretton and each of them will for ever hereafter indemnify the said Fanny Lucy Radmall against all tax, legacy and other duties which may be or become payable by the said Fanny Lucy Radmall in reference to the annuity given by the said recited Will to the said Fanny Lucy Radmall or in reference to other the benefits to which under such Will or these presents the said Fanny Lucy Radmall is or may become entitled."

Then the deed further witnessed "that the said John Gretton Frances Gretton and Clara Gretton hereby withdraw all opposition to the admission of the said recited Will to Probate," and also "That in consideration of the premises the said Frances Gretton and Clara Gretton as beneficial owners hereby charge all the shares and interests of them the said Frances Gretton and Clara Gretton respectively of and in the real and personal estate of the said Frederick Gretton as well under or by virtue of the said recited Will or any other testamentary disposition of the said Frederick Gretton as also as two of his next of kin with the payment until the purchase or transfer hereinbefore authorized to the said Fanny Lucy Radmall of the annuity hereby covenanted to be accepted by her as hereinbefore mentioned and the tax and duties thereon as aforesaid," and also "That in consideration of the premises the said John Gretton as beneficial owner hereby charges all the estate share and interest of him the said John Gretton in the real and personal estate of the said Frederick Gretton as well as such heir at law and next of kin as aforesaid and also under or by virtue of any testamentary disposition of the said Frederick Gretton with the payment until the purchase or transfer aforesaid to the said Fanny Lucy Radmall of the last-mentioned annuity and tax and duties thereon as aforesaid."

The testator's will was proved on April 26, 1883.

Clara Gretton died on September 8, 1887, intestate, and letters of administration to her estate were granted on January 23, 1888, to her brother John Gretton, who and her two sisters Frances Gretton and Mary Wigan were her sole next of kin.

In pursuance of the power conferred by clause (2) of this Indenture, and within the period of five years computed from February 14, 1883, Frances Gretton and John Gretton (Clara Gretton then being dead) in part purchased, and in part transferred, in or into the names of two trustees, one being chosen by them, and the other being chosen by Lady Byron, the sum of 176,700*l.* 3 per cent. consolidated bank annuities, the gross dividends at the time of such purchase and transfer amounting to 5300*l.* a year, and by a deed poll dated June 8, 1888, and expressed to be supplemental to the Indenture of February 14, 1883, therein called the principal Indenture, the two trustees declared that they would stand possessed of the said sum of bank annuities, which by that time had been converted into 2¾ per cent. bank annuities, in trust in the first place to pay the said annuity of 5000*l.* by the above-stated Indenture provided for Lady Byron during her life and the income tax and all duties whatsoever which should become payable in respect thereof such annuity tax and duties to be paid on or at the days or times therein mentioned, and in accordance in all respects with the terms of the said Indenture, and subject to the payment of the said annuity income tax and duties would hold the said sum of 176,700*l.* 2¾ per cent. bank annuities and the dividends thereof as part of the residuary estate of the testator.

Frances Gretton died on December 11, 1897, intestate, and letters of administration to her estate were granted on June 14, 1888, to her brother John Gretton, who and her sister Mary Wigan were her sole next of kin.

In May, 1899, John Gretton acquired from Mary Wigan all her share of the interest of Frances Gretton under the Indenture of February 14, 1883, above set out.

John Gretton died on October 2, 1899, and the defendants John Gretton and Hugh Frederick Gretton, were his executors and also administrators de bonis non of Frances Gretton.

For some years Lady Byron received from the trustees of the deed poll a clear annuity of 5000*l.*, but in consequence of the greatly increased rate of income tax and of super-tax the total annual income produced by the trust funds comprised in the deed poll was altogether insufficient to pay the annuity and the income tax and super-tax thereon. The present trustees therefore took out this summons against Lady Byron, J. Gretton and H. F. Gretton, and John Alfred Graham Wigan the surviving trustee of a settlement of part of Clara Gretton's interest in the annuity fund, for the determination of the following questions: (1.) Whether Lady Byron was entitled to have the annuity of 5000*l.* paid free of (*a*) ordinary income tax (*b*) any and what part of the super-tax payable in respect of her total income; (2.) whether (*a*) the deductions (if any) which Lady Byron was entitled to have made from her assessable income under ss. 17 to 22 of the Finance Act, 1920, (*b*) the first 225*l.* of Lady Byron's taxable income in respect of which under s. 23 of the said Act income tax was charged at half the standard rate, ought to be treated as apportioned between the amount of the annuity and the remainder of her total income, and whether the plaintiffs as such trustees ought accordingly to deduct from the amount of the annuity (*a*) a sum equal to any and what proportion of the income tax which would have been payable in respect of the amount of such deductions if the same had not been made, (*b*) a sum equal to any and what proportion of a sum equal to income tax at half the standard rate of tax on the said sum of 225*l.*; (3.) whether the covenants of indemnity by Frances Gretton and Clara Gretton in the Indenture of February 14, 1883, extended to (*a*) the ordinary income tax on the annuity, (*b*) any and what part of the super-tax payable in respect of Lady Byron's total income, and if so, whether such covenants so far as relating to such income tax and super-tax were valid and enforceable.

W. A. Greene K.C. for the plaintiffs.

Barrington-Ward K.C. and *Farwell* for the defendant Lady Byron. On the deeds there is no agreement at all which comes within the scope of s. 103 of the Income Tax Act, 1842, or r. 23, sub-r. 2, of the General Rules in Sch. I. to the Income Tax Act, 1918. There is no agreement to insure payment to Lady Byron of "any interest rent or other annual payment in full without allowing such deduction"; on the contrary the deed provides for payment of the tax as well as of the yearly sum. On the fair reading of the words the true intent is that Lady Byron should receive a fixed sum per annum and that the income tax thereon should be paid and that Lady Byron should be indemnified against the tax. So long as income tax is provided for and the revenue satisfied, the parties may make what agreement they like: *Brooke* v. *Price.* (1) There is no provision in this case for the payment of an annuity "clear of income tax" as in *In re Peck's Settlement* (2) or "free of income tax" as in *Blount* v. *Blount* (3) and *Burroughes* v. *Abbott* (4), and there is nothing in these deeds to prevent the trustees from deducting income tax from the annuity, and if the trust fund is not sufficient for payment of the tax and annuity Lady Byron can call upon the guarantors to make good the deficiency. The trustees of the will were not parties to the deed of February 14, 1883, which did not affect them. The idea of the Income Tax Acts is that the actual holders of the funds shall be the persons to pay the tax and any agreement which interfered with their duty would be bad. The arrangement in question was between the beneficiaries only, and the deed of 1883 does not, we submit, in terms or form offend any provision of the Income Tax Acts but it fulfils the test stated by P. O. Lawrence J. in *Burroughes* v. *Abbott.* (1) Clause (2.) of the deed shows that Lady Byron was to have the annuity of 5000*l.* less tax and to have the tax as well. Except that the annuity was to be 5000*l.* instead of 6000*l.* as bequeathed by the will, Lady Byron's annuity is exactly similar to that given to her by the will. We cannot contend that the fact that income tax was deducted at the source brings the case within *Brooke* v. *Price* (2) which was distinguished in *In re Cain's Settlement.* (3)

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(1) [1917] A. C. 115.
(2) [1921] 2 Ch. 237.
(3) [1916] 1 K. B. 230.
(4) [1922] 1 Ch. 86.

For the purposes of this case super-tax stands on the same footing as income tax, it is ordinary but additional income tax: *Bowles* v. *Attorney-General* (4); *Brooke* v. *Inland Revenue Commissioners* (5); *In re Bowring* (6); *In re Doxat* (7); *In re Crosse.* (8) *In re Crawshay* (9) turned on the special wording of the will.

The covenants of indemnity stand or fall with the rest of the arrangement; if the latter offends the provision of the Income Tax Acts, which we submit it does not, then the indemnities are void also.

Maugham K.C. and *Bremner* for the other defendants. These defendants have so far paid the income tax in respect of this annuity, but inasmuch as the payment of super-tax involves an ever-growing liability, per Rowlatt J. in

(1) [1922] 1 Ch. 93.
(2) [1917] A. C. 115.
(3) [1919] 2 Ch. 364.
(4) [1912] 1 Ch. 123.
(5) [1918] 1 K. B. 257.
(6) [1918] W. N. 265.
(7) [1920] W. N. 262.
(8) [1920] 1 Ch. 240.
(9) [1915] W. N. 412.

Meekins v. *Inland Revenue Commissioners* (1), they object to pay any further. We submit that this agreement is illegal and void. The 5000*l.* annuity does not stand on the same footing as if it had been given by the will, it rests on the deed of February 14, 1883. Under s. 102 of the Act of 1842 the person who has to pay the annuity has to pay the tax and that alone concerns the inland revenue; the provisions of s. 103 avoiding offending contracts has nothing to do with the revenue: *Floyer* v. *Bankes.* (2) The only legal agreement is one to which the words of both sections apply. There is no authority for saying that a covenant to pay a 5000*l.* annuity and the income tax upon it is good; it is really a covenant to pay an annuity of 5000*l.* free of duty and is bad; Eve J. in *In re Peck's Settlement* (3) refers to such an arrangement but expresses no opinion on it. The true view is that the provision constituted by these deeds is invalid as being a breach of ss. 102 and 103; and if invalid as regards income tax, it is also invalid as regards super-tax. Whatever may be the real meaning of the covenants of indemnity in clause (2.) of the deed, we submit that they do not extend to either income tax or super-tax on the annuity of 5000*l.*

Farwell in reply.

Cur. adv. vult.

July 27. ROMER J. stated the facts and the material clauses of the Indenture of February 14, 1883, and the Deed Poll of June 8, 1888, and continued: In accordance with the trusts of this Deed Poll, Lady Byron appears for some years to have received from the trustees a clear annuity of 5000*l.* per annum without any deduction. Having regard, however, to the high rate of income tax prevailing in recent years, the annual income produced by the trust funds now representing the bank annuities is not nearly sufficient to pay the annuity of 5000*l.* Lady Byron, moreover, claims that she is also entitled to be relieved out of the trust funds, not only of ordinary income tax, but also of super-tax in respect of her annuity. In view of the burden imposed upon the trust funds if this claim is well founded (as to which see *Meekins* v. *Inland Revenue Commissioners* (1)), the persons now representing or claiming through John Gretton and his sisters have raised the question whether Lady Byron is legally entitled to be paid the annuity of 5000*l.* free of income tax, or whether the provisions contained in the Indenture and Deed Poll for the purpose of bringing about that result are not rendered void by s. 103 of the Income Tax Act, 1842, the relevant part of which is now replaced by r. 23, sub-r. 2, of the General Rules in the First Schedule to the Income Tax Act, 1918. This is the first question that I have to decide.

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(1) (1920) 7 Tax Cases, 603, 607.
(2) (1863) 32 L. J. (Ch.) 610.
(3) [1921] 2 Ch. 237, 241.

Sect. 103 of the Act of 1842, and s. 102 which must be read in connection with it, have frequently been the subject of judicial consideration, and it is unnecessary to read them at length. It is sufficient to say that by s. 102 it is provided that upon (inter alia) all annuities payable either as a charge upon any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, there shall be charged a tax at a certain rate for every 20*s.* of the annual amount thereof, and it is provided that in every case where the annuity shall be payable out of profits or gains brought into charge by virtue of the Act, no assessment shall be made upon the person entitled to such annuity, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, and that the person so liable to make such annual payment shall be authorized to make a deduction out of such annual payment at the said rate for every 20*s.* of the amount thereof.

Sect. 103, after imposing a penalty upon any person who (inter alia) should refuse to allow any such deduction, provides as follows: "And all contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void."

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(1) 7 Tax Cases, 603.

It was suggested before me in argument by Lady Byron's counsel that the only object of these words that I have quoted was to protect the revenue, and that any contract, covenant, or agreement which in terms provides that the income tax shall be paid is not within the mischief of the statute. I cannot agree with this contention. The revenue is amply protected without these words. It is not, perhaps, easy to suggest any explanation for their insertion that is completely satisfactory, although, as pointed out by Lord Finlay L.C. in *Brooke* v. *Price* (1), one reason may be that the amount of the income tax varies from year to year, and that the prohibition was deemed convenient in order to ensure that each beneficiary should bear his true proportion of the burden of the tax for the time being. But, whatever may have been the reason for the prohibition, it is clear that the words of it do not apply to an annuity given by a will by way of bounty. For in such a case there is no contract, covenant, or agreement. The direction in the testator's will that Lady Byron's annuity of 6000*l.* should be free of income tax was therefore valid in law, and if the parties to the deed of February 14, 1883, had confined themselves to the agreement set out in the first clause of the operative part of that deed, the stipulation in that clause that the annuity of 5000*l.* should be clear of income tax would not, in my opinion, have been rendered invalid by s. 103 of the Act. For Lady Byron would, I think, have taken the annuity of 5000*l.* under the will, and the will alone, the effect of the deed being merely an agreement on her part to give up a portion of the 6000*l.* annuity bequeathed to her by the will. But the effect of the provisions contained in clauses (2.) and (4.) of the deed if, as subsequently happened, they were resorted to, was in my judgment to secure to Lady Byron an annuity which could no longer be regarded as an annuity derived under the will alone, but was an annuity that became payable by virtue of those clauses. It was admitted before me, on behalf of Lady Byron, that those clauses and the Deed Poll of June, 1888, which gave effect to them, constitute an

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(1) [1917] A. C. 115, 121.

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agreement within the meaning of that word in s. 103, but it was contended that they were not in contravention of the section.

Now there are two ways in which it is possible to provide by agreement for the payment of, in the one case, a minimum annual sum, and, in the other case, a fixed annual sum, that will be unaffected by the rise or fall of income tax, without infringing the provisions of s. 103: (1.) The agreement may provide for a division between the parties of the net balance of the income of a fund which may remain after income tax on the whole has been deducted, and may provide that the proportion paid to one of the parties shall not be less than a fixed sum: see *Brooke* v. *Price*. (1) (2.) The agreement may provide for the payment out of gross income of an annuity of such an amount as that after deduction of income tax thereon a fixed sum will be available for the annuitant: see *Brooke* v. *Price* (1) and *Booth* v. *Booth*. (2) Does the agreement constituted by clauses (2.) and (4.) of the Indenture of February 14, 1883, and the Deed Poll of June 8, 1888, fall within either of the two classes of agreement that I have mentioned, or does it fall within the class of prohibited agreements such as existed in the cases of *Blount* v. *Blount* (3) and *In re Peck's Settlement* (4)? It is impossible, in my opinion, to hold that the agreement falls within class (1.). In the first place I cannot find any indication that the parties were contemplating the division of a fund after the tax had been paid, and the fact that they were dealing with the gross income of the fund seems apparent from the circumstance of provision being made for the payment by the trustees, out of the fund, of the income tax on the annuity. But even if the parties could be treated as dealing with a net income after payment or deduction of the tax, it is impossible to suppose that, out of such net income, Lady Byron was to receive 5000*l.*, and the tax thereon in addition. The agreement could only mean that the trustees were to pay the 5000*l.* after making a deduction therefrom of the tax, and were then to pay over to her a sum equal to the tax for the purpose of putting her in the same position as though no such deduction had been made. This does not appear to me to be a reasonable construction, but, in any event, such an agreement would, in my opinion, be in contravention of s. 103. It would, in effect, amount to an agreement for payment out of the net income of a fixed annuity without deduction, and I can find nothing in *Brooke* v. *Price* (1) to suggest that such an agreement is valid.

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(1) [1917] A. C. 115, 125.
(2) [1922] 1 K. B. 66.
(3) [1916] 1 K. B. 230.
(4) [1921] 2 Ch. 237.

It is, I think, equally impossible to hold that the agreement falls within class (2.). The trustees are to pay the annuity of 5000*l.* and the "tax thereon" (the expression used in the Indenture) or "the income tax . . . . which shall become payable in respect thereof" (the expression used in the Deed Poll). This means the income tax on an annuity of 5000*l.*, and not the income tax on an annuity of 6666*l.* 13*s.* 4*d.*, to take the figure appropriate to a year in which the tax was 5*s.* in the £. The trustees are therefore out of the gross income to pay the annuity of 5000*l.*, and the income tax at the current rate on 5000*l.* It is not expressly stated to whom the income tax is to be paid, but obviously it is to be paid to the revenue authorities, and will, in practice, be paid by deduction at the source. If, having so paid the tax, the trustees are to pay the 5000*l.* to Lady Byron without deduction, the agreement to do so would appear to be in direct violation of s. 103, and therefore void. If the trustees are to pay the 5000*l.* after deducting the tax so paid, the agreement would be valid, but such a construction would not help Lady Byron.

I come, therefore, to the conclusion that Lady Byron is not entitled to have the annuity of 5000*l.* paid to her free of either ordinary income tax or of super-tax, which it is admitted stands for this purpose on the same footing as ordinary income tax, and question (1.) of the originating summons must be answered in the negative.

In the view that I have taken question (2.) does not arise.

The third question of the originating summons is as follows: [His Lordship read the third question as above stated and continued:] Assuming that upon the true construction of the Indenture the covenants apply at all to the annuity provided by clause (2.) of the Indenture, and by the Deed Poll, as to which it is not necessary to express any opinion, it was admitted on behalf of Lady Byron that if she be not entitled to have the annuity of 5000*l.* paid without deduction, the covenant indemnifying her against all tax is invalid and unenforceable: see *In re Peck's Settlement.* (1) I therefore answer the latter part of the third question in the negative.

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(1) [1917] A. C. 115.

Solicitors for the plaintiffs and the defendants other than Lady Byron: *Radcliffes & Hood.*

Solicitors for the defendant Lady Byron: *Dollman & Pritchard.*

R. M.

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Oct. 23.

CORY *v.* CORY.

[1919. C. 108.]

Practice—Discovery—Documents—Action by Vendor of Shares in a Company—Allegation that Shares sold at an Undervalue induced by Fraud and Misrepresentation of a Director—Company made Defendants—Claim for Rectification of Register—Obligation on Company to make Discovery of Documents—Order XXXI., *r.* 12.

In an action against the director of a company, the company, and a third party, the plaintiff alleged that he was induced, by the fraud and misrepresentation of the director and the third party, to enter into an agreement to sell shares in the company to the director at an undervalue, and he asked, as against them, for a declaration that the agreement and the transfer of shares were void and of no effect, and to have the agreement and the transfer set aside. As against the company, he asked to have the register of members rectified by the insertion of his name as a holder of the shares:—

Held, by the Court of Appeal, affirming the decision of Sargant J., that the company was an "other party" to the action within the meaning of Order XXXI., r. 12, and that the Court had jurisdiction to make an order for discovery of documents against the company.

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(1) [1921] 2 Ch. 237.

Held, further, that it was a case in which the Court ought, in the exercise of its discretion, to make such an order to a limited extent.

Spokes v. *Grosvenor Hotel Co.* [1897] 2 Q. B. 124 followed.

PROCEDURE SUMMONS.

This was an application for the ordinary affidavit of documents to be made by all the defendants, and was of a common form character.

The action was one brought by H. B. Cory against Sir Clifford J. Cory, Cory Brothers & Co., Ld., and P. E. Hill. The statement of claim alleged that the plaintiff was the owner of a large number of preference and ordinary shares in the defendant company; that he was induced by the fraud and misrepresentation of the defendants, Cory and Hill, to part with those shares to the defendant Cory at a great undervalue. It further alleged that, although the plaintiff was a director of the defendant Company, he had been unable for a number of years to obtain the balance sheets of the company or any information as to its shares, and that at the time when he was induced to part with the shares he was ignorant of: (A) The real value of the reserves of the company; (B) the real value of the assets of the company; (C) the general financial position of the company; (D) the true value of the ordinary shares of the company. It also alleged that the defendant Cory was practically the sole director of the company, and that he had paid Hill a large sum by way of remuneration, and/or commission for Hill's services in procuring the execution of the agreement under which the plaintiff agreed to sell his shares. The relief asked for was, as against the defendants Cory and Hill, a declaration that the agreement and the transfers of ordinary shares to the defendant Cory were void and of no effect against the plaintiff, and were not binding on him; to have the agreement and the transfers set aside, and to have the agreement delivered up to be cancelled; delivery to the plaintiff of the certificates for the shares; as against the defendant Cory and the defendant company, to have the register of members of the defendant company rectified by the insertion therein of the name of the plaintiff as the holder of the ordinary shares; an injunction to restrain those defendants from excluding the plaintiff from board meetings of the company, or in any way preventing the plaintiff from acting as director of the company, or interfering with his action as such director.

There was an application on October 20, 1920, asking that the plaintiff's claim in the action for relief against the defendant company might be excluded, and that the writ might be rectified by striking out the name of the company as a defendant. In the alternative it was asked that all further proceedings in the action should be stayed as against the company on its undertaking that if the relief claimed against the defendants Cory and Hill were granted the register would be rectified. That application failed, and the company was retained as a defendant. The application also asked that the order relating to the affidavits of documents should be limited to such documents as were relevant to the relief claimed against the defendant company. On this part of the application Russell J. ordered that the discovery of documents by the company should be limited in the first instance to the balance sheets of the company, and to so much and such portions of its books and other documents as contained the details showing how the various items appearing in the balance sheets were made up. At that time the statement of defence had not been delivered, and on the matter coming before the Court of Appeal, it was ordered that all questions of discovery should stand over until after the defence had been delivered. The defence having been delivered, the question of discovery now came before the Court on this summons, when it was contended that the Court had no jurisdiction to make an order as against the company, and that if it had, it ought not to do so in the exercise of its discretion.

The summons was heard before Sargant J. on July 19, 1922.

A. Grant K.C. and *C. A. Bennett* for the plaintiff. The question of the undervalue of the ordinary shares is an issue in the action, and the plaintiff cannot prove this undervalue unless he has discovery of documents that are in possession of the company. The only question is whether the Court can make an order against the company as "any other party" within the meaning of Order XXXI., r. 12. (1) As a matter of justice, the Court will make the order, if it has the power. Apart from the decision in *Spokes* v. *Grosvenor Hotel Co.* (2) there is no decision on this point. That was a clear authority of the Court of Appeal that where a defendant is a necessary party, although no relief is claimed against him, an order for discovery of documents could, as a matter of course, go against him. The plaintiff asks that an order should be made in the terms on which Russell J. made it.

Topham K.C. for the defendant company. The company is now purely a formal party to the action, and there is no issue or community of interests between the plaintiff and the company. *Spokes* v. *Grosvenor Hotel Co.* (2) is an exceptional case, and must not be regarded as an authority: see note in the Annual Practice, 1922, p. 502, under the heading "Irrelevant." In that case, however, there was clearly a community of interest between the parties; here the company is in no way interested. The rule (Order XXXI., r. 1) as to interrogatories is in much the same terms as r. 12, and in *Codd* v. *Delap* (3) an application for leave to administer interrogatories was refused. Discovery is irrelevant if it is not relevant to the matter before the Court, and it has been treated as irrelevant where there was no issue between the parties. *Pardy's Mozambique Syndicate* v. *Alexander* (4) is the inverse of this case, but the principle is the same.

[SARGANT J. The whole of r. 12 is discretionary, and there is, therefore, all the less reason for limiting the extent of it.]

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(1) Order XXXI., r. 12: "Any party may, without filing any affidavit, apply to the Court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. . . ."

(2) [1897] 2 Q. B. 124.

(3) [1906] W. N. 57, 78.

(4) [1903] 1 Ch. 191.

The question of discretion is dealt with in *Pardy's Mozambique Syndicate* v. *Alexander*. (1)

In order to understand *Spokes* v. *Grosvenor Hotel Co.* (2) it is necessary to go back to the earlier cases of *Brown* v. *Watkins* (3) and *Shaw* v. *Smith.* (4) *Brown* v. *Watkins* (3) does not cover this case, but it helps to explain *Shaw* v. *Smith* (4), where it was held that, under the rule as to inspection of property, inspection could not be granted to one defendant of property belonging to another defendant, when there was no right as between them in the action.

With regard to the question of discretion, the Court should bear in mind that this company has made a practice of not disclosing its balance sheets even to shareholders, and if an order is made it ought to be on condition that there should be restrictions on disclosing the contents of the balance sheets to other parties. The order made by Russell J. meant delivering up the balance sheets for ten years, and all the books on which these balance sheets are founded. The plaintiff would get all he wants if the balance sheets for ten years were submitted to an accountant approved by both parties.

[He also referred to *Taylor* v. *Milner* (5) and *Kent Coal Concessions* v. *Duguid.* (6)]

SARGANT J. The position in this case is this, that the matter in question has in fact been decided by a learned judge of the Chancery Division as regards the question of jurisdiction and as regards the question of discretion. As regards the question of jurisdiction I might have contented myself by saying that I do not feel that I ought to dissent from a judgment of another judge of the Chancery Division on a matter of this kind, but I go further than that and I say I have looked into the cases and I am perfectly satisfied

(1) [1903] 1 Ch. 191.
(2) [1897] 2 Q. B. 124.
(3) (1885) 16 Q. B. D. 125.
(4) (1886) 18 Q. B. D. 193.
(5) (1805) 11 Ves. 41.
(6) [1910] 1 K. B. 904.

that there is jurisdiction to make such an order as the learned judge has made. The terms of Order XXXI., r. 12, are [His Lordship read Order XXXI., r. 12, and continued :] It is impossible to have much wider words than those. There is no doubt whatever that the company is "any other party" within the meaning of that rule, and I see no words at all in the rule which prescribe that the discovery to be granted is to be limited to such documents in the possession of the other party as relate solely to such part of the matters in question in the action as are matters between the plaintiff and that other party. To read the words so seems to me to be introducing words into the rule, and words which it seems to me quite unnecessary to introduce, having regard to the very wide discretion given to the Courts under the rule. If there was no discretion at all, that would be a reason for reading the words in a limited way. If the discretion is one of the broadest kind, it seems to me to be one reason, and a cogent reason, for refusing to limit the generality of the language.

A number of cases have been referred to before me, all of which I understand were referred to before Russell J., but, in my judgment, the only case that is of real importance here is *Spokes* v. *Grosvenor Hotel Co.* (1) *Brown* v. *Watkins* (2) and *Shaw* v. *Smith* (3) are both cases between co-defendants which seem to me to rest on a very different foundation; cases of that kind seem to me inapplicable to cases between a plaintiff and defendant; and the other case before Kekewich J., of *Pardy's Mozambique Syndicate* v. *Alexander* (4), does not, in my judgment, go further than a dictum; certainly in that case *Spokes* v. *Grosvenor Hotel Co.* (1) had not been referred to. In my judgment *Spokes* v. *Grosvenor Hotel Co.* (1) is really a stronger case than the present one, because there there was no question really between the plaintiff and the defendant company. The plaintiff really was in substance a co-plaintiff with the defendant company. Here at any rate there are some questions between the plaintiff and the

(1) [1897] 2 Q. B. 124.
(2) 16 Q. B. D. 125.
(3) 18 Q. B. D. 193.
(4) [1903] 1 Ch. 191.

defendant company, although the main questions are really between the plaintiff and the other defendants. In my judgment the company is an "other party" to a fuller extent than the Grosvenor Hotel was an "other party" in the case that I have referred to, or, to at least as full an extent. It is said that now the old practice of making parties parties to the action merely for the purpose of discovery has gone. That is quite true, and if the Court of Appeal had thought that this company was made a defendant purely for the purpose of discovery, they, no doubt, would have struck out the defendant company as a defendant. It is of some importance to refer to that for the purpose of construing what the practice of the Court of Chancery was on the occasion when persons were, according to the then practice, made parties for the purpose of discovery only; it is quite clear the discovery to be granted by the Court, or the discovery it was hoped would be granted, would be discovery in which those persons could not possibly be concerned at all. Therefore the reference to the old practice seems to show that the extent of the discovery was the extent of the general issues in the action, which were not issues between the plaintiff and the person called on to give discovery.

Any cases that have been cited with regard to interrogatories are not of any great importance, because the question of interrogatories is somewhat different from that of discovery of documents.

In my judgment, therefore, Russell J. was perfectly right in holding that he had jurisdiction under Order XXXI., r. 12, to make a general order for discovery against the three defendants, without attempting to distinguish the particular issues with regard to which the defendant company had to give discovery.

As regards the question of discretion, the case is one in which discovery ought certainly to be ordered. There are two main issues in the action. The first is the issue of alleged fraud and alleged collusion, and, secondly, the issue of undervalue. With regard to the issue of undervalue, the position is this, that the defendant, Sir Clifford Cory, has in his possession the whole of the details of the transactions of the company for years past, and has all the balance sheets and all the information relating thereto. On the other hand, the plaintiff has no information of that kind at all, and to say he must be satisfied with such information as he can get by process of subpœna, when the company and their agents can be put in the box and be compelled to produce the documents, is really trifling with the matter. The result would be that if an order were not made for discovery, the plaintiff would have to come to trial with no information as to the question of undervalue. In that state of things I ought to make an order for the discovery and a general order. The order made by Russell J. was that the discovery of documents by the defendant company be limited in the first instance to the balance sheets of the company, and to so much and such portions of its books and other documents as contain the details showing how the various items appearing in the balance sheets are made up. I do not think that is too general. If the plaintiff were to attempt to make use of the wording of that form or order in any oppressive way, the Court would know how to deal with the matter. The plaintiff has assented to this, that the disclosure of the balance sheets and materials for the balance sheets should be limited to the balance sheets for the ten years preceding the date of the agreement mentioned in the pleadings, and, of course, to the materials making up those balance sheets. Accordingly, I propose to limit the order in that way, but otherwise to adopt the language of the order of Russell J.

P. J. B.

C. A.

The defendant company appealed. The appeal was heard on October 23, 1922.

Douglas Hogg K.C. and *Topham K.C.* for the appellants. The question is what (if any) order for discovery ought to be made. The Court can only order discovery relevant to issues between the plaintiff and the defendant company. Order XXXI., r. 12, has been discussed in various cases. The old practice is set out in Wigram on Discovery, 2nd ed.,

C. A.
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p. 164, § 236A: see also Bray on Discovery (ed. 1885), pp. 57 and 59. Here there is no issue between the plaintiff and the defendant company to which the discovery sought can be relevant. In *Shaw* v. *Smith* (1) it was held under Order L., r. 3, that inspection could not be granted to a defendant of property belonging to another defendant when there was no right in question as between them in the action. In principle that governs this case. There is only power to order inspection as between opposite parties: *Brown* v. *Watkins.* (2) The plaintiff and the defendant company are not in that relation to each other. *Spokes* v. *Grosvenor Hotel Co.* (3) seems to be against our contention, but it is submitted that it does not cover this case. The Court always guards against discovery of documents which are not relevant to any issue between the parties: *Pardy's Mozambique Syndicate* v. *Alexander.* (4)

On the authorities the order could not be made against the company; if there is jurisdiction it ought not to be so exercised. The plaintiff seeks disclosure of all the books of the company for ten years back. The order would be detrimental to its interests and would be oppressive.

[They also referred to Daniell's Chancery Practice, 8th ed., pp. 569, 589, 611.]

A. Grant K.C. and *C. A. Bennett* for the respondent were not called upon.

LORD STERNDALE M.R. I think this appeal fails. It is not necessary to say more than that I agree with the decision of Sargant J. and with the reasons upon which it is founded.

WARRINGTON L.J. I agree.

YOUNGER L.J. And I also. *Appeal dismissed.*

Solicitors for the appellants: *Ingledew, Davies, Sanders & Brown, for Ingledew & Sons, Cardiff.*

Solicitors for the respondent: *Ford, Lloyd, Bartlett & Michelmore.*

(1) 18 Q. B. D. 193.
(2) 16 Q. B. D. 125.
(3) [1897] 2 Q. B. 124.
(4) [1903] 1 Ch. 191, 196.

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In re TAYLOR.

TAYLOR *v.* TWEEDIE.

[1921. T. 1378.]

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Will—Construction—Bequest—Extent of—"The money I have and am entitled to now and at any future time"—Enlarging Context—Not a Gift of Testatrix's residuary personal Estate—Securities and Investments.

The testatrix by her will, written on a stationer's form filled in by herself, after appointing executors, directing payment of her debts, and making certain bequests of furniture and plate, bequeathed one-third of "the money I have and am entitled to now and at any future time" to several legatees, and to another "the remaining two-thirds of my money, including the money I have now and that which I am entitled to now or at any future time." Peterson J. held that the bequest was not a gift of the testatrix's residuary personal estate, but was confined to money which the testatrix had or was entitled to, whether cash in hand or at the bank, or debts payable presently or at some definite future date, and therefore included War Loan and debenture stock and bonds redeemable at a fixed date, but not debenture stock, whether irredeemable or redeemable only at the option of the issuing company:—

Held, by the Court of Appeal, that there was a context in the will sufficient to prevent the word "money" having its strict sense, and that the gift included all the testatrix's invested capital, and not only the investments specified by Peterson J. In other words, the gift included all the testatrix's investments, her interest in which was expressible or receivable in terms of currency.

Order of Peterson J. [1922] 1 Ch. 569 varied.

APPEAL from the decision of Peterson J. (1)

Jessie Alison Taylor by her will dated December 22, 1909, revoked all former wills, appointed the plaintiffs executors, directed payment of all her debts and funeral expenses, and then proceeded as follows: "I give and bequeath unto Mrs. Sandeman wife of Col. J. E. Sandeman residing at Richmond all the furniture left to me by my husband now lying in Taylor's Depository and to her daughter Mrs. Molteno the plate chest and the contents thereof also at Taylor's Depository. To William F. Duncan Taylor of 9 Cavendish Road, Blundell Sands, I bequeath one third of the money I have and am entitled to now and at any future time. To my four cousins Winifred Lilian Muriel and Eirene . . . .

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and to Betty (Elizabeth) Wright (my god-daughter) . . . . I bequeath the remaining two thirds of my money including the money I have now and that which I am entitled to now or at any future time." The will contained no further disposition by the testatrix.

The testatrix died on January 21, 1921, and her will, which consisted of a printed form filled in by her, was duly proved by the plaintiffs. Mrs. Sandeman predeceased the testatrix.

The testatrix died possessed of stocks, shares and securities to the value of nearly 16,000*l.*; cash in the house, and an uncashed money order for a total of 8*l.* 9*s.* 2*d.*; 821*l.* 17*s.* 7*d.* cash at the West Brighton branch, and 227*l.* 4*s.* 1*d.* cash at the Hanover Square branch of the London County Westminster and Parr's Bank; a sum of 21*l.* 11*s.* 6*d.* in the hands of some Brighton solicitors; 1000*l.* lent on mortgage of freehold property at Brighton and furniture and personal effects to the value of 798*l.* 15*s.*

The plaintiffs took out a summons to which Muriel Tweedie one of the legatees named in the will, and the testatrix's sole next of kin were respondents, for the determination of the question whether the word "money" as used by the testatrix included the whole or any and what part of her residuary estate.

Upon this summons Peterson J. held that the word "money" in a will meant money in its strict sense, unless there was a context which was sufficient to show that the testator used the word in a more extended sense, and further that there was no sufficient context in this will to show that the gift of "the money I have and am entitled to now and at any future time" was a gift of the testatrix's residuary personal estate.

The summons afterwards came on again for the determination of further questions which had arisen in consequence of the effect of his Lordship's decision given above.

The estate of the testatrix, besides certain stocks and shares, comprised a sum of 500*l.* 4 per cent. War Loan (1925/45) and also a debenture bond, certain debenture stocks, both redeemable and irredeemable, and rent-charge stocks, all of which are specified in a schedule exhibited and marked S. V. T. 2, which will be found set out in the report in the Court below. (1) The evidence relating to these scheduled securities was to the effect that the debenture stocks, lien stock and rent-charge stocks specified in Part I. of the schedule were irredeemable; that the debenture stocks specified in Part II. were redeemable only at the option of the respective companies by which the same were issued; and that the debenture stock and debenture bond specified in Part III. were redeemable as to the debenture stock in the year 1987, and as to the debenture bond in the year 1943.

The summons as amended asked whether the word "money" included all or any of the debenture bond, debenture stocks and rent-charge stocks specified in the schedule.

Upon the amended summons Peterson J. held that debenture stock, whether irredeemable or redeemable only at the option of the company, and the interest thereon, which was in the nature of an annuity, were not covered by the bequest, but, further, that the War Loan and debenture stock and bonds, all of which involved a definite obligation for repayment on or before a fixed date, together with the intermediate interest thereon, which was in the nature of interest on a loan, were covered by the bequest.

The legatees appealed. The appeal was heard on June 15 and 16, 1922.

Tomlin K.C. and *Cleveland-Stevens* for the appellants. The learned judge has held that there is a context justifying a departure from the strict meaning of the word "money," but he has taken too narrow a view of the rule of construction and unduly limited the meaning of the word. It is a word which varies in its meaning according to its collocation. It is plain that the testatrix intended to deal with her whole fortune, and that intention must be regarded: *Lucas-Tooth* v. *Lucas-Tooth.* (2)

[LORD STERNDALE M.R. Can the Court take notice of

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(1) [1922] 1 Ch. 583.

(2) [1921] 1 A. C. 594, 601.

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the fact that the will is drawn by an unskilled person who has used words in their popular sense ?]

Yes. The learned judge's construction results in a partial intestacy, which is to be avoided.

The Court can have regard to the form and character of the original will as well as the probate copy: *In re Harrison* (1); *In re Dayrell* (2); and Halsbury's Laws of England, vol. xxviii., § 1258, p. 652; see also the cases there referred to, particularly *Forth* v. *Chapman.* (3) This will is written on a law-stationer's form filled in by the testatrix herself, and she being inops consilii will be supposed to have used words in a popular and not in a legal sense. The simple meaning of "money" is of course current coin, but it may be extended to mean "possessions expressible in money values." It has really no technical meaning. It is of ambiguous import and may be interpreted having regard to all the surrounding circumstances under which it is used: *In re Cadogan* (4); *Legge* v. *Asgill* (5); *Rogers* v. *Thomas* (6); *Dowson* v. *Gaskoin* (7); *Gosden* v. *Dotterill.* (8)

"Money" used by itself is limited to coins, and would not of course pass stock or bonds, etc. The question in each case is what is the true meaning of the word having regard to its collocation. There is no hard and fast rule to be applied. The rules of eighty years ago are not now to be treated as strictly binding on the Court: *Lowe* v. *Thomas.* (9)

In *Langdale* v. *Whitfeld* (10) "moneys" were held to include money due to the testatrix at her death.

In re Buller (11) does not afford much assistance except for the reference to *In re Cadogan.* (4) There was a clear context there, as there was in *In re Skillen* (12): see also *In re Gliddon.* (13)

This was intended to be a residuary gift passing all the testatrix's personal estate. It is residuary in position. Secondly the gift includes all her investments. She intended to make a complete testamentary disposition operating upon the whole of her property. The phraseology of this will shows that "money" cannot mean only cash. Why then stop there? The testatrix clearly meant to dispose of her invested property, her whole fortune.

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(1) (1885) 30 Ch. D. 390.
(2) [1904] 2 Ch. 496, 499.
(3) (1720) 1 P. Wms. 663, 666.
(4) (1883) 25 Ch. D. 154.
(5) (1823) T. & R. 265n.
(6) (1837) 2 Keen, 8.
(7) (1837) 2 Keen, 14.
(8) (1832) 1 My. & K. 56.
(9) (1854) Kay, 369; 5 D. M. & G. 315.
(10) (1858) 4 K. & J. 426, 432.
(11) (1896) 74 L. T. 406.
(12) [1916] 1 Ch. 518.
(13) [1917] 1 Ch. 174.

[*In re Woolley* (1) and *In re Powell* (2) were also referred to.]

Manning K.C. and *F. K. Archer* for the respondent. The learned judge was bound by the authorities to decide as he has done.

[LORD STERNDALE M.R. You may take it as admitted that "money" prima facie means what is strictly money.]

On the will there are merely three specific gifts and nothing more. There is no context here to expand the meaning of the word "money," so that it will include anything which is not strictly money: *Williams* v. *Williams.* (3)

In *Larner* v. *Larner* (4); *In re Skillen* (5); and *In re Gliddon* (6) there was as here a direction to pay debts, etc.

Tomlin K.C. in reply. The expression "money to which I am entitled" includes something which is not strictly money—namely, choses in action. It gives the legatee a right of action, and not coin, so that "money" here means something wider and there is no logic in putting any limitations upon it. It would lead to absurd results. When once the construction starts down the slope there is no stopping short of the whole fortune of the testatrix: *Waite* v. *Combes.* (7)

[*Manning K.C.* That case is questioned in Hawkins on Wills, 2nd ed., p. 67.]

Cur. adv. vult.

1922. July 25. LORD STERNDALE M.R. This appeal from Peterson J. raises a question upon the construction of the will of Jessie Alison Taylor. I cannot help thinking that it is rather a lamentable case.

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(1) [1918] 1 Ch. 33.
(2) [1898] 1 Ch. 227.
(3) (1878) 8 Ch. D. 789, 792.
(4) (1857) 3 Drew. 704.
(5) [1916] 1 Ch. 518.
(6) [1917] 1 Ch. 174.
(7) (1852) 5 De G. & Sm. 676.

The testatrix died possessed of a substantial estate, including the investments mentioned on p. 583 of the report in the Court below (1), of the value of between 15,000*l.* and 16,000*l.* Instead of giving instructions to have her will properly drawn up she, in order I suppose to save a guinea or two, bought one of the skeleton printed forms of will which can be bought in various places, and filled it up herself. I understand that the form had a note upon it by which the purchaser was instructed to use clear words and words of which she understood the meaning. She may have used words of which she thought she knew the meaning, but naturally she had no knowledge of the meaning which various decisions have attached to those words when used in a will. The result has been that the words she used are so ambiguous that those charged with the administration of her estate have been forced to come to the Court for directions, and the estate will, whatever the result of the litigation, be diminished by a substantial sum representing the costs of that litigation.

The dispositions of the will are very simple and, if it had been drawn by any one with any skill or experience, the whole trouble would have been avoided. [The Master of the Rolls read the will and continued :] The difficulty arises as to the meaning to be attached to the word "money." If I were asked what in my opinion was the wish of the testatrix I should feel little difficulty as to the answer. I believe she wished to dispose of all her estate, and not to die intestate as to any part, and that she thought she had done so when she used the word "money." I think she intended to use it in the colloquial sense in which it is used in such expressions as "What has she done with her money ? To whom has she left her money ?" where the expression is meant to apply to all the estate of which the person about whom the expression is used died possessed.

The question, however, which I have to decide is different ;

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(1) [1922] 1 Ch. 569, 583.

it is what is the meaning of the words the testatrix has used, and whether I am at liberty to give them the meaning which I believe the testatrix wished them to bear, consistently with the words used and the principles of interpretation laid down by the authorities. As was said by Knight Bruce L.J. in *Lowe* v. *Thomas* (1): "The numerous class of persons who, in wills and otherwise, speak as if the office of language were to conceal their thoughts, have no right to complain of being taken to mean what their language expresses." Unfortunately in the case of wills it is not the testator or testatrix, but other persons who have cause for complaint.

The authorities are very fully discussed by Peterson J. and I do not propose to repeat the discussion. I agree that they establish the proposition that the word "money" when used in a will means money in its strict sense, unless there is a context which is sufficient to show that the testatrix used it in a more extended sense. There are also I think two other guides to the contruction of the word. I agree with Sargant J. in *In re Skillen* (2), that a comparatively slight context will enlarge the strict meaning of the words. The learned judge says: "It may perhaps be doubtful on the cases whether the term 'money' alone and without the aid of any context is sufficient to pass the whole personal estate. For the decision to that effect of Kay J. in *In re Cadogan* (3) has been doubted by Stirling J. in *In re Buller*. (4) "But it is clear that a comparatively slight context one way or the other may either restrict the term 'money' within comparatively narrow limits or may assist it so as clearly to include the whole personal estate or the residue of the personal estate." I also think that when a will is obviously not drawn by a skilled lawyer, as is the case here, the words used may be looked at less strictly than in a case where it is so drawn: see *Forth* v. *Chapman* (5) and Halsbury's Laws of England, vol. xxviii., p. 652. If there be a context enlarging the

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(1) 5 D. M. & G. 315, 317.
(2) [1916] 1 Ch. 518, 521.
(3) 25 Ch. D. 154.
(4) 74 L. T. 406.
(5) 1 P. Wms. 663, 666.

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meaning of the word "money," it may enlarge it to the extent of including the whole of the personal estate or the residue of the personal estate, and it may enlarge it to any point between ready cash only and the point just mentioned. We were not, however, referred to any case in which a point between those two extremes has been held to exist.

In this case I do not feel myself justified in holding that it is enlarged so as to include the residue of the personal estate. The gift of money is not residuary in terms. It is not, though it follows a direction to pay debts and funeral expenses, a gift of "other money" or the "rest of the money," and it immediately follows specific gifts of some furniture, and of a plate chest and its contents. There were other furniture and other plate chests, and in those circumstances I do not think I can read the word "money" so as to include all the residue, including the other furniture and those other plate chests. I agree with Peterson J. that so to hold would be contrary to the decision in *Lowe* v. *Thomas* (1), and that it makes no difference that in this case the gifts of the specific articles precede the gift of money, whereas in the case cited they followed it.

But there is here a context which, in my opinion, enlarges the meaning of the word "money" beyond its strict meaning of cash. They are the words "money I have and am entitled to now and at any future time," and the words, "money including the money I have now and that which I am entitled to now and at any future time." In the case of cash, there is no difference between "have" and "am entitled to," and therefore, applying the rule that in the case of a person inops consilii words are to be taken where possible in a popular sense, I think that context is enough to carry the meaning of the word "money" beyond its strict meaning of cash. The question is how far it is to be carried. The learned judge has decided that it has to be carried to some extent, and has therefore included in the gifts debentures and other investments by which a right to recover the principal is given, even though it cannot be enforced for a long time, in one case over sixty years. He has, however, excluded all perpetual debenture stock and other investments in which the capital is not repayable or is only repayable at the option of the company in which it is invested.

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(1) 5 D. M. & G. 315.

I cannot agree with the learned judge on this point. I think he has only enlarged the meaning of the word "money" from cash actually in hand to money payable at a future day. But it is to be observed that the will in the cases included by the learned judge does not give to the legatees money; it gives to them a right to recover money, which is a chose in action, and therefore, the will extends to give something which is not money, but which may popularly be called an investment of money.

I think, applying the rule I have mentioned, that in this will words should be taken as used in their popular meaning, "money" should therefore on its context be read as investments, and should be taken to include all the securities or investments mentioned in the list set out in the report in the Court below. (1)

WARRINGTON L.J. The question in this case arises on the construction of a gift in the will of the testatrix, of "money" expressed in two ways—first as "The money I have and am entitled to now and at any future time," and secondly as "My money including the money I have now and that which I am entitled to now or at any future time."

Peterson J. has delivered two judgments. In the first of these he held on the authorities and, I think I may say, particularly on the authority of *Lowe* v. *Thomas* (2), that the gift did not include the general personal estate. In the second he held, on the authority of *Langdale* v. *Whitfeld* (3), that it did include certain debenture stock the principal of which is repayable at a fixed date, and a debenture bond of the City of Cape Town which also created an obligation to repay by a fixed time, and 4½ per cent. War Loan

(1) [1922] 1 Ch. 583.
(2) Kay, 369; 5 D. M. & G. 315.
(3) 4 K. & J. 426.

stock 1925/45, as to which the Government are under an obligation to repay in 1945, with an option to do so in or after 1925. This second judgment is not questioned by the respondents.

The appellants contend that in the second judgment the learned judge ought to have gone further, and to have held that the gift comprised all the invested capital of the testatrix, consisting of certain stocks and shares and perpetual debenture stocks. They also contend, if necessary, that the gift ought to be held to comprise the general personal estate, but what they really insist on is the first contention mentioned above.

Now the only principle established by the authorities is, I think, correctly stated by the learned judge in the following words: " 'Money' is to be treated in the strict sense unless there be a context which shows something to the contrary." "Money in the strict sense" means, as I understand, money actually in hand as cash, or at a bank on drawing account, and certainly does not include such items of property as in this case have been held to pass.

This result was arrived at, in my opinion correctly, by virtue of the context and particularly of the expression "entitled to now or at any future time": see *Langdale* v. *Whitfeld.* (1)

There is therefore a context sufficient to prevent the word "money" having, in this will, the "strict sense." When once this result is arrived at the Court is, in my judgment, at liberty to adopt such wider construction as will effectuate what in its opinion was, on the whole will, the true intention of the testator. What then ought we to say is the meaning of this will, the strict sense of "money" being excluded by the context? It has been pointed out in some of the cases and it is in accordance with common knowledge that persons frequently, in speaking of their "money" mean their possessions as a whole, and, in my opinion, the testatrix has used the word in that sense in the present will, with this qualification that, in view of the fact that she has made specific gifts of furniture and chattels, such of these things as are not so disposed of would not pass under the gift of her money. Her gift ought, however, in my opinion, to be held to include all her invested capital, and not only the items mentioned in the order of the learned judge.

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(1) 4 K. & J. 434.

When once the strict sense is excluded I can see no logical reason for drawing the line at any point short of the popular meaning, unless, of course, there are expressions indicating that such was not the testator's intention.

I think, therefore, the order of the learned judge must be varied by declaring that all the items in the list mentioned passed by the bequest.

YOUNGER L.J. A reference to the original will of this lady shows that it was the handiwork of the testatrix herself, made on a printed form supplied by stationers. The direction as to payment of debts is part of the printed form. The subsequent provisions of the will are in the handwriting of the testatrix.

These circumstances, to which it is not inadmissible to refer, although the weight to be attributed to them need not be great, in the present case seem to me to cut both ways. While, on the one hand, they suggest that the testatrix was, when she made her will, inops consilii, and accordingly assist the supposition that any words of her own were, in cases of divergence between the two, used in a popular and not a legal sense: see *Forth* v. *Chapman* (1), on the other hand they tend to deprive the words of the somewhat oblique and technical significance which Mr. Tomlin was disposed to attach to them, as showing, that is to say, that the testatrix was, by her will, minded to dispose of the whole of her property, real and personal, the words "all my debts and funeral expenses shall be paid as soon as conveniently may be after my decease." Accordingly I am disposed to deal with the question of construction which is actually before us without relying on the one hand on these last words—not perhaps very important: see *In re Skillen* (2)—

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(1) 1 P. Wms. 663, 666.

(2) [1916] 1 Ch. 518.

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or on the other hand on the fact that this lady was her own draftsman, or perhaps I should say draftswoman.

In other respects the principles to be applied are not in debate. There is a legal sense, which in the absence of a context is the sense that must be attributed to the word "money" when used in a will. In its strict legal sense the word is confined to ready money actually in hand. The popular sense of the word is quite different. A gift by a testatrix of her money or of all her money would, in popular language, be the equivalent of a gift of her fortune—of her "brass," to use a North-country phrase—of her whole personal estate, perhaps even of her entire property, real and personal, to use more technical terms.

This popular interpretation cannot, however, in the absence of a context, be placed upon the word "money" when used in a will, although the Court will, to aid that interpretation, so far at least as personal estate is concerned, fasten upon even a slight context when it can find one. The question here is whether a sufficient context exists in this will, and what is the conclusion to which it leads.

It would assist the appellants if they could successfully maintain that, in its context, the word "money" here includes at least the whole undisposed of personal estate of the testatrix. In my opinion, it is not possible on construction to apply so extended a meaning to the word. The specific gifts of furniture and of a plate chest, preceding the disposition of her "money," certainly preclude a Court of construction, as I think, from holding that either the residue of the testatrix's furniture or her remaining three plate-chests—we were told that at her death there were three others—can be included in the term "money." The absence of the introductory word "other" or any equivalent expression precludes us, as I think, from so holding.

This result, it must be agreed, creates a difficulty for the appellants. Our attention has not been drawn to any case in which, where the Court has held that the word "money" was used in other than the strictly legal sense, it has stopped short of including in the expression the entire undisposed of personal estate of a testator. And the result is unfortunate for the appellants also from another point of view. It deprives their contention of the support it would otherwise have derived from the consideration that if it was accepted, an intestacy would thereby be altogether avoided.

But, in my judgment, these difficulties are not fatal to the conclusion that in the case of this will we are justified in placing upon the word, as used in it, a signification much wider than that attributed to it by the learned judge, although one not universal in its range. The learned judge has recognized that it is not possible to restrict the word here to its legal signification. He has held it to include moneys secured by obligations not maturing for many years after the death of the testatrix. He has done so, because in this will there is a context. The word is not used alone; and the real question is how great is the extension of its legal meaning required or authorized by that context. [His Lordship quoted the words of the will and continued :] Now although the words of description are not precisely identical it is, I think, reasonably clear that the fund of which one-third is given in one direction, and two-thirds in another, is the same fund. The "money" which the testatrix gives, is money, first, which she has "now" or may have "at any future time"; and, secondly, "money" to which she is entitled "now or at any future time." Even if the gift were confined to money which she "has" as distinct from that to which she "is entitled," it would, in my judgment, be impossible to confine the gift to what Lord Eldon in one case called "A handful of casual moneys": *Legge* v. *Asgill.* (1) Doubtless the gift includes any money strictly so called, which, at her death, the testatrix possessed, but the reference, twice repeated, to the money she has "now" and also the reference once made to that which she will have "at any future time"—not, be it noted, only at her death—seems to me to exclude the idea that the testatrix was thinking of or was primarily dealing with fugitive coins, such as are acquired and disposed of from day to day. What, as it seems to me,

(1) T. & R. 268n.

is plainly pointed at, is something which, when acquired, would or might be retained indefinitely as part of her fortune, in a word, investments, her interest in which was expressible in terms of currency. And this conception is, of course, greatly strengthened by the other phrase which led the learned judge to extend the meaning of the word "money" so far as he did, "money which I am entitled to now or at any future time." On these words, Peterson J. extended the gift to debts whenever payable. He excluded, however, all investments which did not involve some obligation to repay the principal moneys at a fixed date, and, of course, all shares involving no obligation of repayment as such.

Now I recognize the necessity of extending the word as the learned judge did. I cannot, however, see any ground for stopping where he stopped. I can, for instance, see no reason, on the principle adopted by the learned judge, why the legatees should not be entitled in perpetuity to the interest on perpetual debenture stock. That interest is payable as a debt, although the principal is not so repayable. But I am prepared to go further. I can see no relevant distinction for the present purpose between money to which the testatrix was entitled by virtue of her rights, say as a shareholder, and money to which she was entitled under some obligation to pay it, however postponed in time that obligation might be. She is entitled to the money as much in the one case as in the other, and her right to receive it is as much a subject of sale or realization in the one case as in the other.

The result, in my judgment, is this. The context here precludes a Court of construction from including in this gift any property the testatrix's interest in which is not primarily expressible or receivable in terms of currency; on the other hand, that context is sufficient to extend it to all such property of the testatrix undisposed of otherwise by her will as is so expressible or receivable. In other words it extends to all the securities and investments possessed by the testatrix at her death, and a list of which is exhibited in these proceedings.

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It is satisfactory on, as I think, strictly legal principles, to be able to attach to the words of this testatrix a meaning which is approximately as wide as that which, one can have little doubt, she intended and believed them to bear.

Appeal allowed; Order varied.

Solicitors: *A. F. & R. W. Tweedie; Gibson & Weldon, for Elvy Robb & Berry, Tunbridge Wells.*

G. A. S.

P. O. LAWRENCE J.
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In re DENT (A BANKRUPT).

Ex parte THE TRUSTEE.

Bankruptcy—Marriage Articles—Contract for future Settlement of Property wherein the settlor had no interest at the date of Marriage—Operation of subsequent Acquisition of Property on the antecedent Contract—Settlement, in pursuance of Articles, assigning Property—Transfer of Property within Two Years of Bankruptcy—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 42, *sub-ss.* 2 *and* 3.

By marriage Articles in 1914, made between husband and wife and three trustees, it was agreed that, after the intended marriage, an indenture of settlement should be executed and that the husband would bring into settlement all property to which he then was or thereafter might become entitled, to be held, subject to life interests in favour of husband and wife, upon trusts to be mutually agreed between the trustees of the settlement. It was further agreed that the first trustees of the settlement should be the three trustees of the Articles therein named, and that if they or either of them should fail to accept the trusteeship of the settlement, then such other person or persons as the spouses should nominate; and that in the meantime until the execution of the settlement the persons in whom such property should be vested should hold the same upon the trusts of the settlement. The marriage was solemnised on the day of the execution of the Articles.

On the death of his father on February 22, 1918, the husband, under his will, became entitled in reversion, subject to the life interest of the testator's widow, to a share in his residuary estate.

On June 13, 1919, the trustees of the Articles gave notice to the will trustees of the execution of the Articles. On October 21, 1920, the husband, in pursuance of his contract contained in the Articles, executed a settlement by which he assigned to the trustees thereof (of whom there were three and of whom one was also a trustee under the Articles, but

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the other two were not) his interest under his father's will upon trusts for the benefit of his wife and children. On December 5, 1921, the settlor was adjudicated bankrupt. The trustee in bankruptcy moved for a declaration that the settlement and the transfer of the property purported to be made thereunder were void as against him:—

Held, first, that the acquisition by the bankrupt on his father's death of the property which was non-existent at the date of the Articles did not operate under the well settled doctrine (referred to in *In re Lind* [1915] 2 Ch. 345) as a complete equitable assignment of that property, as the persons to whom the property was contracted to be assigned and the trusts upon which such persons were to hold it were not ascertained at the date of such acquisition; secondly, that, even if there had been an equitable assignment within that doctrine, it would not have operated as a transfer of property within the true meaning of s. 42, sub-s. 3, of the Bankruptcy Act, 1914; and, thirdly, that the assignment contained in the settlement of October, 1920, operated as a transfer of property within the meaning of that sub-section and was void by reason of its execution within two years of the commencement of the bankruptcy.

MOTION.

The following facts are taken from the judgment of P. O. Lawrence J.: "On Oct. 26, 1914, Guy Herbert Boysragon Dent entered into marriage Articles which were expressed to be made between himself (therein called the husband), of the first part, Florence Mildred Eames (the intended wife), of the second part, and Herbert Wilkinson Dent, John Wallace Eames and Frederick Lindsay (therein called the trustees), of the third part. After a recital of the intended marriage, the Articles contained provisions to the following effect: (Para. 1) That as soon as conveniently could be after the solemnisation of the said intended marriage an indenture of settlement should be made and executed. (Para. 2) That the first trustees of the settlement should be the three gentlemen named as parties of the third part, or if they or either of them should fail to accept the trusteeship under the settlement—then, such other person or persons as the spouses should nominate for the office. (Para. 4) That the husband should bring into the intended settlement all real and personal estate to which he was entitled in possession or reversion or to which he might thereafter become entitled, not exceeding in value the sum of 10,000*l*. (Para. 6) That the real estate to which the husband should become entitled during the coverture should be settled to uses or upon trusts by way of strict settlement in manner therein mentioned. (Para. 6A) That the funds should, subject to the life interests of the spouses provided by para. 6, be settled upon trusts to be mutually agreed between the trustees, and, in case of dispute, upon such trusts as should be approved of as proper and conformable to those Articles, to be settled by the President for the time being of the Liverpool Law Society, and, in particular, that the arbitrator was to be at liberty to determine the extent of the power to make advances to children, the property which should be included in and what should be excepted from the provision for the settlement of any property which might be settled by the wife. (Para. 7) That provision was to be made for the settlement upon trusts corresponding with those to be settled in the previous para. 6A of such other property as the spouses should become entitled to or entitled to dispose of, except property which coming from one source, at any one time should be of less value than 300*l.* or personal chattels of any kind of similar value. (Para. 9) That the spouses should, when required by the trustees, and the trustees should also execute such settlement and should also execute and do all such conveyances, assurances, deeds, transfers, instruments and acts as might be necessary or proper in order to fully effectuate the said settlement. (Para. 10) That until the settlement and assurances had been executed, the several persons in whom the property intended to be brought into the settlement was then vested should stand seised and possessed of and interested in the same upon the trusts and subject to the powers and provisions therein expressed or implied in relation thereto.

"Shortly after the Articles were signed the marriage was duly solemnised, but the intended settlement was not executed until the month of Oct., 1920. On Feb. 22, 1918, the husband's father died whereupon the husband became entitled under his father's will to one-third of the residue of his father's estate, less 500*l.*, after the death of his mother.

"On Aug. 1, 1918, the husband mortgaged his reversionary

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interest under his father's will, not disclosing the fact that he had executed the marriage Articles. On June 13, 1919, the surviving trustees named in the Articles gave notice to the trustees of the father's will of the fact of the execution of the Articles and that notice was acknowledged by the will trustees on June 17, 1919."

"On Oct. 21, 1920, the husband executed the settlement which is the subject matter of the present application. The settlement was expressed to be made between the husband of the first part, the wife of the second part, and Frederick Lindsay (one of the trustees under the Articles of Oct. 26, 1914), Henry Neville Fairbank, Cecil William Eames and Percy Jennings, who were therein called the trustees, of the third part, and after reciting the solemnisation of the marriage, the title of the husband to the interest under his father's will and the mortgage of Aug. 1, 1918, and after reciting, that the property representing the testator's residuary estate consisted of the property specified in the second schedule thereto and was then standing in the names of the present trustees of the will and that, upon the treaty for the said marriage, it was agreed that the share to which the husband was entitled in the property comprised in the testator's will should be settled in manner thereinafter appearing and after reciting an agreement by the husband to enter into a covenant for payment of certain sums by way of pin money in favour of his wife and for the settlement of his other or after-acquired property It is witnessed that in pursuance of the said agreement (i.e., the agreement contained in the Articles) and in consideration of the marriage, the husband, as settlor, with the approbation of his wife assigned to the trustees all his interest under the will of his father, subject to the life interest of his mother (who was then and is still alive) and subject to the mortgage of Aug. 1, 1918, upon the trusts and subject to the powers thereinafter declared and contained concerning the same being trusts and powers for the benefit of the settlor's wife, the settlor himself and the children of the marriage. On Dec. 2, 1920, the trustees of the settlement gave notice of its execution to the

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trustees of the will of the husband's father, which notice was duly acknowledged by those trustees on Jan. 3, 1921."

"On Dec. 5, 1921, the husband presented a petition in bankruptcy upon which he was in due course adjudicated bankrupt; Dec. 5, 1921, is therefore the date of the commencement of his bankruptcy."

The trustee in bankruptcy moved for a declaration that the settlement of October 21, 1920, and the transfer of the property thereby purported to be made by the bankrupt were void as against the trustee in bankruptcy and that the settlement so far as it contained any contract by the bankrupt to transfer the property was also void as against him subject to such rights of the persons to whom such transfer was made to claim for dividend as might be given by s. 42, sub-s. 3, of the Bankruptcy Act, 1914.

Sect. 42 of that Act, so far as material, is stated below. (1)

(1) Bankruptcy Act, 1914, s. 42, sub-s. 2: "Any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy, be void against the trustee in the bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied."

Sub-s. 3: "Any payment of money (not being payment of premiums on a policy of life assurance) or any transfer of property made by the settlor in pursuance of such a covenant or contract as aforesaid shall be void against the trustee in the settlor's bankruptcy, unless the persons to whom the payment or transfer was made prove either:—

"(a) that the payment or transfer was made more than two years before the date of the commencement of the bankruptcy; or

"(b) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred; or

"(c) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property

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Clayton K.C. and *Giveen* for the trustee in bankruptcy. The settlement of October 21, 1920, is void as against the trustee in bankruptcy on the ground that it is a transfer of property made in pursuance of a contract by the bankrupt in consideration of marriage for the future settlement on his wife or children of property wherein he had not at the date of the marriage any estate or interest whether vested or contingent in possession or remainder: see s. 42, sub-ss. 2 and 3, of the Bankruptcy Act, 1914; and the respondents cannot bring the case within any of the exemptions contained in paras. (*a*), (*b*) or (*c*), of sub-s. 3.

Hansell, for the bankrupt's wife and the trustees of the settlement. The settlement, in the events which happened, had not the force of a transfer of property within the meaning of s. 42, sub-s. 3, of the Bankruptcy Act, 1914. True, the contract contained in the Articles related to future property in which the bankrupt had not at the date of his marriage any estate or interest, vested or contingent, in possession or remainder; but upon the death of his father when the bankrupt first became entitled to an interest in his father's residuary estate, the contract in the Articles became "executed" and the title of the trustees under the Articles was complete when they gave the notice of June 13, 1919, to the trustees of the father's will. The acquisition of the property by the bankrupt and that notice operated as a transfer of the property within the meaning of s. 42, sub-s. 3, of the Act, 1914: see *Ward* v. *Duncombe* (1), *In re Lind* (2), *In re Magnus*. (3) After the acquisition of the property and the notice of June 13, 1919, the property

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expected to come to the settlor from or on the death o a particular person named in the covenant or contract and was made within three months after the money or property came into the possession or under the control of the settlor;

but, in the event of any such payment or transfer being declared void, the persons to whom it was made shall be entitled to claim for dividend under or in respect of the covenant or contract in like manner as if it had not been executed at the commencement of the bankruptcy.

Sub-s. 4: "'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

(1) [1893] A. C. 369.

(2) [1915] 2 Ch. 345.

(3) [1910] 2 K. B. 1049.

ceased to be the property of the bankrupt: *Rutter* v. *Everett* (1); and he thereupon became a trustee of the property, which by the Articles he contracted to assign, to the trustees of the settlement, and the assignment which he made by the settlement was made in his character of trustee and not in pursuance of his contract under the Articles. The contract having already in fact been executed, the assignment, although expressed in the settlement to be made in pursuance of the Articles, was not in fact so made, but was made by the bankrupt in his capacity of trustee quite apart from the Articles. Consequently, as early as June, 1919 (more than two years before the commencement of the bankruptcy), the contract was an executed contract and there was at that date that which was equivalent to a transfer within the meaning of s. 42, sub-s. 3, of the Act of 1914, but inasmuch as that transfer was made more than two years before the date of the commencement of the bankruptcy, the case was brought within the exemption mentioned in para. (*a*) of that sub-section and therefore the transfer was not void thereunder.

Wintringham N. Stable, for the infant children, adopted the last argument.

Clayton K.C. in reply. The transfer resulting from the equitable doctrine referred to in *In re Lind* (2), is not such a transfer as that which is mentioned in sub-s. 3. The transfer referred to in that sub-section is an actual transfer made in pursuance of the contract to settle (see the fifth part of the decision in *In re Reis.* (3)) The exception from the operation of the sub-section specified in para. (*c*) thereof would have no meaning, if the subsequent acquisition of the after-acquired property contracted to be settled operated as a transfer within the meaning of the sub-section.

P. O. LAWRENCE J. In this case the question arises whether the trustee in bankruptcy is entitled to a declaration that an alleged transfer of property made by the bankrupt on

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(1) [1895] 2 Ch. 872.
(2) [1915] 2 Ch. 345.
(3) [1904] 2 K. B. 769, 777, 778.

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October 21, 1920, is void under s. 42, sub-s. 3, of the Bankruptcy Act, 1914. The ground upon which that declaration is sought is that the bankrupt made that transfer within two years before the date of the commencement of his bankruptcy in pursuance of a contract entered into by him in consideration of his marriage for the future settlement on his wife and children of property wherein he had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder. [His Lordship then stated the facts as above mentioned and proceeded:] In these circumstances the trustee in bankruptcy contends that the settlement of October 21, 1920, operated as a transfer of property made by the bankrupt in pursuance of the contract contained in the marriage Articles of October 26, 1914. The settlement certainly purports to be such a transfer of property; it recites the contract made by the bankrupt in consideration of his marriage for the future settlement of the property, and it purports to assign the property in pursuance of that contract. Mr. Hansell and Mr. Stable however contend that the settlement did not operate as a transfer of property made by the settlor within the meaning of sub-s. 3 of s. 42 of the Bankruptcy Act, 1914, because such a transfer had already been effected by virtue of the contract contained in the marriage Articles, which contract, they maintain, operated as a transfer of the property from the moment when the property was acquired by the bankrupt or at all events from the date when the trustees under the Articles gave notice of the Articles to the will trustees, and in support of their contention they rely on the decision in *In re Lind.* (1) It is, no doubt, well settled that an assignment of property, which at the date of the assignment has no existence, will bind the property when it comes into existence. In such a case the assignment, although void in law, operates in equity as a contract to assign the property when it comes into the possession or under the control of the assignor. It is also well settled that such a contract is not merely a contract in respect of which damages for breach can be recovered, but is a contract which in equity gives to the assignee an estate or something in the nature of an estate in the property. The principle underlying the decisions appears to be that when the property comes into existence, equity, considering that done which ought to have been done, fastens upon the property, and the contract to assign thus becomes in equity equivalent to a complete assignment.

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(1) [1915] 2 Ch. 345.

The difficulty in applying that doctrine to the full extent contended for by counsel in the present case lies in the fact that the Articles are not in the form of an immediate assignment of the bankrupt's after-acquired property nor are they in the form of a contract to assign the property to the trustees of the Articles immediately on the property coming into existence. The Articles stipulate for the preparation and execution of a settlement and until such settlement was executed it remained in doubt first who the trustees of that settlement would be and consequently who the assignees of the after-acquired property were and, secondly, upon what trusts the property was to be held. The bankrupt's father died before any settlement was executed and therefore before the intended assignees of the after-acquired property and the precise trusts had been ascertained; and, in these circumstances, I think that it would be stretching the doctrine beyond its proper limits if I were to hold that the contract contained in the Articles operated as a complete assignment of the bankrupt's reversionary interest under his father's will, either directly that will came into force or when the notice was given. The bankrupt had only agreed to assign his after-acquired property to the trustees of the intended settlement and at the date of his father's death and of the notice there were no ascertained persons in whom the interest of the bankrupt could be said to have vested. As a matter of fact only one of the trustees of the Articles eventually consented to act as a trustee of the settlement and the other three trustees of the settlement were only selected by the spouses several years after the bankrupt had acquired his reversionary interest under his father's will.

In the result I have come to the conclusion that in the circumstances of this case neither the acquisition by the bankrupt of his reversionary interest under the will of his father nor the notice given to the will trustees operated as a complete equitable assignment of that interest and, consequently, that there was no transfer of property until the settlement of October 21, 1920, was executed.

There is however, in my opinion, a further answer to the contention put forward on behalf of the trustees of the settlement—namely, that on the true construction of s. 42, sub-s. 3, the expression "transfer of property" contained in that section does not include an assignment resulting from the application of the equitable doctrine referred to in *In re Lind* (1) but means an actual transfer made by the bankrupt in pursuance of the antecedent contract to settle the after-acquired property.

The effect of sub-s. 2 of s. 42 is to render the contract for the settlement of after-acquired property void if it has not been executed before the date of the commencement of the bankruptcy. This sub-section does not apply in the present case, as it is common ground between the parties that the contract contained in the Articles has been executed so far as the bankrupt's reversionary interest is concerned either (according to Mr. Hansell's contention) by reason of the equitable doctrine already mentioned or (according to Mr. Clayton's contention and to my opinion) by the settlement of October 21, 1920.

The effect of sub-s. 3 of s. 42 is to render any transfer of property made in pursuance of the contract for the settlement of after-acquired property void as against the trustee in bankruptcy unless (inter alia) the bankrupt has made such transfer more than two years before the commencement of the bankruptcy.

That the transfer of property contemplated by sub-s. 3 is an actual transfer made by the bankrupt by some act or instrument subsequently to the original contract to settle, and is not a transfer resulting merely from the equitable doctrine is I think clearly shown by para. (*c*) of sub-s. 3, which excepts from the operation of the sub-section a transfer of property made in pursuance of a contract to settle property coming to the bankrupt from or on the death of a particular person named in the contract if such transfer is made (and here lies the importance of this paragraph) within three months after the property came into the possession or under the control of the bankrupt. This enactment would be nonsensical if every contract to settle after-acquired property operated automatically as a transfer of that property within the meaning of sub-s. 3 immediately on its coming into the possession or under the control of the bankrupt.

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(1) [1915] 2 Ch. 345.

Mr. Hansell also relied on the fact that the bankrupt in equity became a trustee of the reversionary interest when it came into his possession or under his control and contended that the assignment of that interest contained in the settlement was an assignment in his character of trustee and not as settlor and therefore did not operate as a transfer of property within the meaning of sub-s. 3. In my opinion this contention is not sound. Apart from the form of the settlement which negatives this contention, the language of the sub-section shows that the Legislature contemplated that a transfer of property could be made by a settlor after he had acquired the property although such settlor, according to Mr. Hansell's argument, in every case would be in the position of a trustee for the persons to whom he had contracted to assign the property.

Supposing that by the Articles in the present case the bankrupt had in terms agreed to settle any property expected to come to him on his father's death, he would, according to Mr. Hansell's contention, have been a trustee of the reversionary interest bequeathed to him by his father's will immediately on his father's death and yet under para. (*c*) of sub-s. 3, unless he had transferred that interest within three months from the date of his father's death, it would have vested in his trustee in bankruptcy. This in my opinion demonstrates the fallacy underlying Mr. Hansell's argument.

For the reasons I have stated I have come to the conclusion that the settlement of October, 1920, operated as a transfer

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of property within the meaning of sub-s. 3, and is void as against the trustee in bankruptcy, as it was executed within two years of the date of the commencement of the bankruptcy.

There will be a declaration that the transfer of the reversionary interest of the bankrupt under his father's will purporting to have been made by the settlement of October 21, 1920, is void as against the trustee in bankruptcy; and that such interest is vested in the trustee in bankruptcy subject to any rights therein which the mortgagees under the mortgage of August 1, 1918, may have. The respondents will have their costs of this motion out of the reversionary interest the subject matter of this application and the trustee in bankruptcy will take his costs out of the bankrupt's estate.

Solicitors: *Cohen & Cohen; Sharpe Pritchard & Co., for Lindsay & Elsworth, Liverpool.*

H. C. H.

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Oct. 24.

In re KINATAN (BORNEO) RUBBER, LIMITED.

Company—Winding Up—Articles of Association—Construction of Article—Distribution of surplus Assets—Partly paid-up Shares—Surplus Assets insufficient to repay Whole of paid-up Capital.

By one of the articles of association of a company it was provided that "If the company shall be wound up, and the assets available for distribution among the members as such shall be insufficient to repay the whole of the paid-up capital, such assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, at the commencement of the winding up, on the shares held by them respectively." The issued capital of the company consisted of fully paid shares and partly paid shares. Upon the application of the liquidator in the voluntary winding up of the company for the determination of the principle upon which the assets available for distribution, which were insufficient to return to the shareholders the whole of their paid-up capital, ought to be distributed:—

Held, that the effect of the article, upon its true construction, was to take the case out of the principle of distribution laid down by *Ex parte Maude* (1870) L. R. 6 Ch. 51, and that the assets available for distribution among the members of the company ought, without calling up any uncalled capital and exclusive of such uncalled capital, to be distributed among such members in proportion to the amounts actually paid up or which, according to the calls made before the commencement of the winding up, ought to have been paid up before the commencement of the winding up on the shares held by such members.

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Kinatan (Borneo) Rubber, Ld., *In re.*

Adjourned Summons.

The Kinatan (Borneo) Rubber Co., Ld., was incorporated in 1910, to acquire certain rubber estates in British North Borneo. The issued capital consisted of 20,000 1*l.* fully paid shares and 60,000 1*l.* shares on which 13*s.* 6*d.* only had been called up and had been paid with the exception of 5549 shares on which there remained calls unpaid amounting to about 487*l.*

Art. 151 of the company's articles of association (which was in the same form as form 152 on p. 783 of Palmer's Company Precedents, 11th ed., Part I.) provided as follows: "If the company shall be wound up, and the assets available for distribution among the members as such shall be insufficient to repay the whole of the paid-up capital, such assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, at the commencement of the winding up, on the shares held by them respectively. And if in a winding up the assets available for distribution among the members shall be more than sufficient to repay the whole of the capital paid up at the commencement of the winding up, the excess shall be distributed amongst the members in proportion to the capital at the commencement of the winding up paid up or which ought to have been paid up on the shares held by them respectively. But this clause is to be without prejudice to the rights of the holders of shares issued upon special terms and conditions."

By resolutions passed and confirmed on April 10 and 27, 1922, the company went into voluntary liquidation and a liquidator was appointed. There were liquid assets in the hands of the liquidator, not sufficient to return to the shareholders the whole of the paid-up capital, amounting to about 8000*l.*, available for distribution among the shareholders. On March 30, 1922, circulars were enclosed with the notices

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for convening the meeting for passing the resolution to wind up, indicating the alternative methods of distributing those available assets—that is to say, (1.) "to call up the unpaid balance on the partly paid shares, and to distribute the assets (including sums so called up) among the shareholders in proportion to the number of shares held by them respectively. If this course were adopted the distribution would be approximately, on the fully paid shares 6*s.* 11*d.* per share; on the partly paid shares 6*s.* 11*d.* per share less 6*s.* 6*d.* called up or actually 5*d.* per share; (*b*) also involving the calling up of the unpaid balance on the partly paid shares, but the assets (including the sums called up) would be distributed so that the deficiency of such assets to repay the whole of the capital, would be borne by shareholders in proportion to the capital paid up on their respective shares before the calls were made. If this course were adopted, the distribution would be approximately, on the fully paid shares 2*s.* 9*d.* per share; on the partly paid shares 8*s.* 4*d.* less 6*s.* 6*d.* called up or actually 1*s.* 10*d.* per share. On either basis the call would be a notional one only, as the amount repaid would exceed the call."

Accordingly, the liquidator issued the present summons to have it determined whether according to the true construction of art. 151 of the company's articles and in the event which had happened of the assets of the company available for distribution among its members as such being insufficient to repay the whole of the paid-up capital of the company, (*a*) the said assets, exclusive of any uncalled capital, ought, without calling up uncalled capital, to be distributed among the members in proportion to the amounts actually paid up or which ought at the date of the commencement of the winding up to have been paid up on the shares held by such members respectively or (*b*) the said uncalled capital ought to be called up and the said assets, inclusive of the amount so called up, ought to be distributed among the members rateably in proportion to the number of shares held by them respectively with set-off of calls against such distribution or how otherwise.

Heckscher for the liquidator.

Whinney for the fully paid shareholders. The principle of distribution laid down in *Ex parte Maude* (1) is applicable to this case; the uncalled capital of 6*s*. 6*d*. per share ought to be called up, either actually or notionally, and the assets in the hands of the liquidator, inclusive of the amount so called up, ought to be distributed among the members of the company rateably in proportion to the number of shares held by them respectively with a set-off of calls against such distribution. Art. 151 is not substantially different from the article in *Anglo-Continental Corporation of Western Australia* (2), and is not, as that article was not, sufficient to take this case out of the principle of *Ex parte Maude.* (1) The words in the article are: "capital which ought to have been paid up at the commencement of the winding up." The article is dealing with the matter ex post facto. Under the article it became the duty of the liquidator upon the winding up to call up the unpaid capital. In order to avoid the principle of *Ex parte Maude* (1) and to restrict the call to the calling up of arrears of calls made prior to the winding up, the article should have provided for losses being borne in proportion to the capital paid up or which ought to have been paid up "prior to" the commencement of the winding up.

Cecil Turner for the partly paid shareholders. Art. 151 is expressly designed to distinguish this case from *In re Anglo-Continental Corporation of Western Australia* (2), and to take the case out of the principle of *Ex parte Maude.* (1) The words "at the commencement of the winding up" have reference to the preceding words "capital which ought to have been paid up." The article refers only to capital which ought to have been paid up in consequence of calls made prior to the commencement of the winding up; in other words, it refers only to arrears of calls. The article does not throw any duty on the liquidator to make a call after the commencement of the winding up. In the article in the *Anglo-Continental Corporation Case* (2), the words "at the

(1) L. R. 6 Ch. 51.

(2) [1898] 1 Ch. 327.

commencement of the winding up" refer to the shares held by the members and not to the capital which ought to have been paid up. In *Ex parte Lowenfeld* (1) the assets available for distribution were there held to include the uncalled capital, and there was no special provision, in that case, which, upon its proper construction, was strong enough to avoid the principle of *Ex parte Maude.* (2)

P. O. LAWRENCE J. This case raises a short and interesting point upon the construction of art. 151 of the company's articles of association. [His Lordship read the article, and proceeded :] The assets now available for distribution are insufficient to return the whole of the paid-up capital : and the question arises how the liquidator ought to distribute those assets amongst the shareholders. The case of *Ex parte Maude* (1) laid down the principle that, where the shares in a company have been unequally called up, and, after payment of the debts, there remains a surplus which is insufficient for the return of the whole of the paid-up capital then (in the absence of an express provision regulating the distribution of the surplus assets in some other manner) the uncalled capital is as much liable to be called up for the purpose of meeting the deficiency or loss—for it is a question of providing for a loss and not a question of distributing profits—as it is for the payment of debts. The result of that decision was that, after the capital account had been equalized by calling up or treating as called up so much of the unpaid capital as was necessary for that purpose, the whole of the resulting balance was returned to the shareholders in proportion to the nominal amount of the shares held by them respectively. The principle of that case was followed by Wright J. in *In re Anglo-Continental Corporation of Western Australia.* (3)

I agree with Mr. Whinney's contention that prima facie the most equitable method of dealing with losses is the one which was adopted in the two cases to which I have referred. But the question here is whether art. 151 excludes that general

(1) (1893) 70 L. T. 3. (2) L. R. 6 Ch. 51.
(3) [1898] 1 Ch. 327.

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rule and provides for the distribution of the available assets in some other manner. Upon its proper construction, I think that the effect of art. 151 is to throw the loss upon the shareholders not in proportion to the nominal amounts of the shares held by them, but in proportion to the amounts which at the date of the commencement of the winding up were paid up or which at that date ought to have been paid up on their shares. Mr. Whinney asks me to construe the words "which ought to have been paid up at the commencement of the winding up," as operating to include capital which the liquidator might call up in the liquidation and therefore as throwing on the liquidator the duty to call up the unpaid capital for the purpose of apportioning the loss upon the principle of *Ex parte Maude.* (1) In my judgment, however, those words have no such operation and do not cast any such duty on the liquidator, but were merely intended to provide for the case of a shareholder not having paid a call made prior to the commencement of the winding up. In my opinion the words, "at the commencement of the winding up," have reference to the immediately preceding words "capital which ought to have been paid up" and not to the words "shares held by them respectively." It is in this respect that art. 151 differs from the corresponding article in *In re Anglo-Continental Corporation of Western Australia* (2), which provided that the surplus assets should be distributed so that, as nearly as might be, the losses should be borne by the members in proportion to the capital paid up or which ought to have been paid up "on the shares held by them respectively at the commencement of the winding up." Upon the construction of that article the words "at the commencement of the winding up" clearly have reference to the words "on the shares held by them," and Wright J. held that "capital paid or which ought to have been paid up" meant not merely capital paid up or which ought to have been paid up before the commencement of the winding up, but included capital called up in the course of the liquidation not only for the purpose of paying the debts, but also for the

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(1) L. R. 6 Ch. 51.

(2) [1898] 1 Ch. 327.

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purpose of putting the fully paid-up shares on a level with the partly paid-up shares. In my view the language of art. 151 makes such a construction impossible in the present case. In the result, therefore, I propose to make a declaration that the assets available for distribution among the members of the company, without calling up or treating as called up any uncalled capital, ought to be distributed among the members in proportion to the amounts actually paid up or which in obedience to any calls made before the commencement of the winding up, ought to have been paid up at the commencement of the winding up on the shares held by them respectively.

Solicitors: *Mayo, Elder & Co.*

H. C. H.

SARGANT J.
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July 4, 5, 28.

In re KNIGHT AND HUBBARD'S UNDERLEASE.

HUBBARD *v.* HIGHTON.

[1922. K. 377.]

Landlord and Tenant—Underlease subject to Lessee's Power to determine—Sub-underlease—Power to determine—Lessor's Power exercisable only if desiring to determine superior Lease—Assignment of Lease and Underlease to Trustees of a Society—Notice by Agents of Society of Intention to determine Underlease—Notice from Agents of Society to determine Sub-underlease.

Plaintiff was entitled as sub-underlessee of premises under a sub-underlease of 1908 determinable by either sub-underlessor or sub-underlessee on September 26, 1922 or 1929, subject to a proviso that the lessor's power to determine should be exercisable only in the event of his desiring to determine the superior lease under which he held. The superior lease of 1908 for twenty-one years from September 29, 1908, was subject to determination by the lessee at the end of the first seven or fourteen years of the term.

In 1920 the trustees of a friendly society took an assignment of the lease and underlease, and later acquired the freehold reversion in the whole of the premises. The agents of the society gave notice to the trustees of its desire to determine the underlease, and to the plaintiff of its intention to determine the sub-underlease:—

Held, that the lessors of the sub-underlease were entitled to give notice to the plaintiff to determine the sub-underlease.

Batty v. *Vincent* (1921) 124 L. T. 594 followed.

Held, further, that the notice of February 17, 1922, given by the society's agents to the plaintiff, was valid.

BY a lease (hereinafter called the lease) dated July 6, 1869, and made between the then Duke of Bedford and others of the first three parts and Ernest Haythorne Reed of the fourth part, certain lands, known as 34 Bloomsbury Square, were demised to Reed from June 24, 1869, for the term of 79½ years at the rent, and subject to the covenants and conditions therein mentioned. By an indenture of underlease (hereinafter called the underlease) dated August 20, 1908, and made between Philip Felix Renaud Saillard, the then owner of the leasehold interest, under the lease, of the one part, and Samuel John Knight, of the other part, Saillard demised 34 Bloomsbury Square to Knight, from September 29, 1908, for the term of twenty-one years determinable as therein mentioned at the rent, and subject to the covenants and conditions therein mentioned, including a proviso by virtue of which, the lessee for the time being thereunder was entitled to determine the underlease at the end of the first seven or fourteen years of the term, by six calendar months' previous notice in writing. By another indenture of underlease (hereinafter called the sub-underlease) dated November 16, 1908, and made between Knight of the one part and the plaintiff of the other part, Knight demised to the plaintiff a portion of 34 Bloomsbury Square, from September 29, 1908, for the term of twenty-one years less three days, determinable as therein mentioned, and at the rent, and subject to the covenants and conditions, therein mentioned, including a proviso for determination of the sub-underlease in the following words: "Provided always and it is hereby agreed that if the lessor or the lessee shall either of them be desirous of determining this present lease at the expiration of the first seven or fourteen years of the term hereby granted and of such desire shall give to the other of them six calendar months' previous notice in writing or leave the same at or send by registered letter to his usual or last-known place of abode in England then and in such case immediately after the expiration of the said term of seven or fourteen years (as the case may be) this present lease and everything herein contained shall cease and be void subject and without prejudice to the rights of either party against the other in respect of any of the covenants and provisions herein contained Provided lastly and it is hereby agreed and declared that the lessor shall not nor will exercise his option to determine this lease at the end of the said seven or fourteen years unless he shall require to do so for the purpose of enabling him to exercise the option contained in the lease under which he holds the said premises to determine the same at the end of one of those periods." In June, 1920, one Frederick Gill Rice acquired, on behalf of the Liverpool Victoria Friendly Society, both the leasehold interest under the lease subject to the underlease, and also the leasehold interest under the underlease, subject as to the part thereof demised to the plaintiff by the sub-underlease to the term created by the sub-underlease, and as to other parts thereof, to other subleases or sub-tenancies; and, by two indentures of assignment, dated December 22, 1920, each made between Rice of the one part, and the defendants and another person since deceased (who were, and were expressed to be, the then trustees of the society), Rice assigned the leasehold interests so vested in him to the said trustees. About the same time, the society acquired, through the medium of Rice, and had conveyed to the same trustees, the freehold of 34 Bloomsbury Square. The various conveyances to Rice and from him to the trustees, were made in such a form as to recognize the continued existence of the lease, the underlease and the sub-underlease; and it was admitted on behalf of the plaintiff that there had been no merger of any of the successive leasehold interests under the lease, the underlease or the sub-underlease.

In June, 1920, the plaintiff received notice of the sale to Rice, and was requested to, and did thenceforth, pay rent to agents on his behalf; and in December, 1920, the plaintiff received notice of the assignments by Rice to the Liverpool Victoria Friendly Society, and was requested to, and did thenceforth, pay rent to Messrs. Tyler & Co. as agents for the society.

On January 16, 1922, Messrs. Tyler & Co., as the agents of the society, and purporting to act for them as freeholders of the property, gave notice to the plaintiff to determine his lease. This notice was, of course, ineffectual, as coming from the freeholders, since there was no existing relationship between the plaintiff and the owners of the freehold; but the notice provoked an inquiry by the plaintiff as to the grounds on which the society were purporting to determine the lease; in answer to which, Messrs. Tyler & Co. referred to the proviso in the sub-underlease, and on February 17, 1922, they wrote to the plaintiff: "We have submitted to our clients' solicitors, Messrs. Tickle & Company, of 63, Cheapside, E.C. 2, the point which you raised with regard to the Society's power to determine your lease, and we beg to enclose a copy of a letter we have received from them dealing with the matter, from which you will see that they hold the view that the Society have power to so determine. We would ask you, therefore, to kindly take this as formal notice of our clients' intention to determine your lease, dated November 16, 1908, under which you hold the premises, at September 29 next, and we shall be glad if you will kindly acknowledge the same. If you would like to communicate with Messrs. Tickle & Company, direct on the subject of the legal point which you raised, we shall have no objection whatever to your doing so." The enclosed letter was in these terms: "Replying to your letter of the 10th inst. it seems to us that it is quite within the power of the Society to determine the sub-lease of November 16, 1908, under the provision contained in such sub-lease, and they can so determine it for the reason that they are desirous of exercising their option to determine contained in the lease of August 20, 1908. The assignment to the Society of the lease to Knight contains no expression of merger and it being for the benefit of the Society that such lease should not merge and the question of merger being always one of intention, it may, we think, be taken that such lease is still being kept alive, if only for the express purpose of determining it under the provision contained in it, and above referred to. Even if the lease to Knight had been expressly merged we still think that the Society could have determined Mr. Hubbard's lease, for any declaration of merger by the Society would have shown a very strong intention of putting an end to it, but it may save any question, if the Society go through the pure formality of giving notice to themselves of their intention to determine." To this, the plaintiff, on February 20, 1922, sent the following reply: "Messrs. Tyler & Company have been good enough to forward me a copy of your letter to them of the 16th instant, relating to the purported determination of the lease I hold of these offices. It seems to me that your view of the matter is not correct and that your clients have no power to determine my lease, and I propose to issue an originating summons to determine the question. As I understand the position, Mr. F. G. Rice in June 1920, purchased the freehold of these premises and the leases thereof, other than the occupation leases, mine being one of the latter, and that thereafter your clients purchased the freehold from Mr. Rice subject to the occupation leases, including my lease. I shall be glad if you will let me know whether these assumptions of mine are accurate, and let me have particulars of the various documents so that I may supply counsel with the necessary information to prepare the originating summons." This was followed by further letters. These were as follows: February 21, Messrs. Tickle & Co. to Mr. Hubbard: "We have your letter of the 20th inst. and note that you disagree with the views expressed by us to our clients' agents. We fear we do not quite follow the position you are taking up in this matter, or how you have obtained or are concerned with the knowledge of our clients' domestic affairs and whilst it is, of course, open to you to take what course you may think proper in your interests, as at present advised we do not see our way to give you the information or assistance you ask for." To this the plaintiff replied on February 23, "I am in receipt of your letter of the 21st inst. for which I thank you. The knowledge I have in this matter was gathered when Mr. Rice purchased, and from the notices regarding the payment of my rent. Surely when your clients purport to determine my lease I am concerned with their power to do so. I regret that you do not see your way clear to render any assistance in the matter and I must therefore do the best I can with the information I have, and I shall be glad to know that you will, on behalf of your clients, accept service of the originating summons herein." On February 24, the plaintiff wrote again: "Referring to my letter of yesterday's date, I do not desire to indulge in personal litigation if it can be avoided, and I may mention that my counsel thinks that quite apart from the question of merger that on the construction of the proviso in the lease your clients are not entitled to give any notice to determine the lease as they cannot be said to 'require' to do so within the terms of the proviso." On March 21, 1922, Messrs. Tickle & Co., as agents for the society, sent the following notice to the trustees of the society: "As solicitors and agents for and on behalf of the Liverpool Victoria Friendly Society we hereby give you notice that in pursuance of the power vested in the lessee of the premises known as No. 34 Bloomsbury Square in the County of London, under an indenture of lease, dated the 20th day of August, 1908, made between Philip Felix Renaud Saillard of the one part and Samuel John Knight of the other part, and of which lease the Liverpool Victoria Friendly Society are the present assignees, the said Society are desirous of determining the before mentioned lease as from the 29th day of September, 1922, being the date of the expiration of fourteen years of the term created by the said lease."

The plaintiff, a solicitor, then issued this summons, asking (1.) Whether, according to the true construction of the sub-underlease and in the events which had happened, the society or the trustees was or were in the months of January, February, or March, 1922, entitled to give to the plaintiff a valid and effectual notice to determine the sub-underlease; and (2.), if so, whether any such valid and effectual notice had been given.

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KNIGHT AND HUBBARD'S UNDERLEASE, *In re.*

HUBBARD *v.* HIGHTON.

W. A. Greene K.C. and *C. D. Myles* for the plaintiff. The provision in the sub-underlease, enabling the landlords to determine at the end of seven or fourteen years of the term only if they required to do so for the purpose of exercising the option to determine the underlease under which they held, rendered the power unexercisable as soon as they became the owners of the leasehold reversion. There is a condition precedent to the exercise of the power that has never been satisfied. The lessees under the underlease cannot give notice to determine their tenancy to themselves as lessors. When one person owns a leasehold interest and the reversion thereto then, even though there be no merger, all the covenants, powers and conditions which depend on a relationship of landlord and tenant are suspended. No valid notice can be given by a person to himself. The determination of the underlease only arises by virtue of a contract to surrender, and a man cannot contract with himself. That being so, the condition on which the plaintiff's landlords had a right to determine the sub-underlease had not been satisfied. Further, a lessee who determines his tenancy is only liable for damages for breach of covenant to deliver up vacant possession if, by reason of a sub-tenancy, he is unable to give vacant possession. It does not deprive him of the right to determine his own tenancy, but he cannot, by his own voluntary act, prejudice the estate of his underlessee: *Great Western Ry. Co.* v. *Smith* (1); *Mellor* v. *Watkins.* (2) The object of the power taken by the plaintiff's landlords was to guard against a possible liability for damages in such a case; but there can be no such liability when the landlords of the underlease and the sub-underlease are the same persons.

Again assuming that the notice to determine the plaintiff's tenancy remained exercisable, it has never been validly exercised. Both the first and second notices are bad because they were not given by the owners of the leasehold reversion, the trustees of the society, or on their behalf. This is essential in order that the notice should be valid:

(1) (1876) 2 Ch. D. 235, 253.

(2) (1874) L. R. 9 Q. B. 400, 405.

see *Jones* v. *Phipps* (1); *Seaward* v. *Drew* (2); *Stait* v. *Fenner*. (3)

Galbraith K.C. and *Errington* for the defendants. The trustees of the society are bare trustees of the property vested in them for the society. Their position is made clear by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 25, 47, 49 and 50, and the registered rules of the society, rr. 3, 8, 14, 15 and 23. The Court does not favour merger if it gives a benefit to a stranger, which it was never intended he should have: *Ingle* v. *Vaughan Jenkins* (4); *Crosbie-Hill* v. *Sayer*. (5) To allow the plaintiff to hold up the whole scheme of the society would be such an injustice as was contemplated by Parker J. in *Manks* v. *Whiteley* (6), and by Fletcher Moulton L.J. in the same case in the Court of Appeal. (7)

To allow possession of the lease and underlease to effect the power of the society, as owners of the lease and possessors of the underlease, to determine the sub-underlease, would be giving a benefit to the plaintiff, a stranger, which was never meant to be conferred on him. *Batty* v. *Vincent* (8) was a very similar case to the present, the only distinction being that there one device was adopted to prevent merger, while here there was another device—namely, a form of conveyance that showed that merger was not intended. If the defendants are effectively to exercise the power of determining the underlease, they must at the same time determine the sub-underlease.

The notice given to the plaintiff to determine the tenancy was ample. An agent to receive rents has authority to determine the tenancy: *Doe* v. *Mizem*. (9)

[They also cited *Browne* v. *Peto* (10); *Roe* v. *Hayley* (11); *In re Fletcher*. (12)]

Greene K.C. in reply.

(1) (1868) L. R. 3 Q. B. 567.
(2) (1898) 67 L. J. (Q. B.) 322.
(3) [1912] 2 Ch. 504.
(4) [1900] 2 Ch. 368.
(5) [1908] 1 Ch. 866.
(6) [1911] 2 Ch. 448, 459, 460.
(7) [1912] 1 Ch. 735, 763, 764.
(8) 124 L. T. 594.
(9) (1837) 2 Mood. & R. 56.
(10) (1899) 16 Times L. R. 131.
(11) (1810) 12 East, 464.
(12) [1917] 1 Ch. 339.

July 28. SARGANT J. delivered the following written judgment. The questions here are whether, prior to March 29, 1922, the Liverpool Victoria Friendly Society or the defendants, as the trustees of that society, were entitled to give to the plaintiff an effectual notice terminating at the expiration of fourteen years, that is, on September 29, 1922, an underlease to him of November 16, 1908; and if so, whether an effectual notice to do so has, in fact, been given.

It was stated to me on the hearing of the summons, and appears to be common ground between the parties, though I do not think it was actually proved, that the society were acquiring the various interests in 34 Bloomsbury Square for the purpose of the reconstruction of the building as a large block of offices for the occupation of the society themselves.

The position of the trustees of the Liverpool Victoria Friendly Society differed in no essential particular from the ordinary position of trustees of friendly societies. The properties conveyed to, or vested in them, from time to time shifted without conveyance to the persons who were from time to time appointed to be, and registered as, the trustees of the society. The whole management of these properties was in the hands of the committee of management of the society, and the trustees were, in fact, a mere holding body, nominees of the society, and holding exclusively for their benefit.

As regards the first question raised by the summons, the plaintiff alleges that the society could not determine the sub-underlease for the following three reasons. In the first place, he says that on the true construction of the proviso, no occasion had arisen for such determination; the society could not, in the circumstances, "require" to determine the sub-underlease for the purpose of exercising the corresponding option in the underlease. The only object of the provisions as to the determination of the sub-underlease by the lessor thereunder was to protect the lessor against a claim for damages by his lessor under the underlease, should the underlease be determined and the sub-underlease be left in existence. Secondly, it is said that the society being both lessors and lessees as regards the underlease were unable to give themselves notice to determine the underlease, the power to do so was suspended; and since the underlease could not be determined under the option given to the lessees thereunder, these lessees, as the lessors under the sub-underlease, were unable to give any corresponding notice to determine the sub-underlease. And, thirdly, it is said that the notice actually given to determine the underlease—namely, the notice of March 21, 1922—was, on the face of it, a bad notice.

The first of these three contentions is that which has the greatest semblance of substance; but even so it is anything but convincing to my mind. The words of the clause in the sub-underlease are clear, and apply in my judgment to the present case. The society are desirous of determining the sub-underlease, and desire or require to do so for the purpose of exercising the option to determine the underlease without leaving the sub-underlease in existence; and the mere fact that in the particular circumstances of the case they would not be subject to a claim for damages, should the sub-underlease be so left in existence, seems to me immaterial. It may well be that the apprehension of such a liability to damages was the motive for enabling the lessor to determine the sub-underlease should he be determining the underlease, but the prospect of the liability was not made, in terms, a condition of the exercise by the lessor of his power; and I do not think that the Court should insert such an implied condition, for the purpose of giving the lessee under the sub-underlease a fortuitous advantage for which he never bargained, in an altogether peculiar and unexpected event. As regards this first argument of the plaintiff, the case is almost exactly on all fours with the very recent case of *Batty* v. *Vincent* (1); and I adopt and follow the reasons there given by Eve J.

The second argument—namely, that the society could not give themselves notice to determine the underlease—seems

(1) 124 L. T. 594.

to me to have still less to commend it. When once merger is abandoned, and the co-existence of the two interests in the society or their trustees is admitted, it seems to me to follow that the society can validly act in respect of either or both of those interests, and that for this purpose, there is nothing absurd or illogical in the society, as the owner of one interest, giving a notice to the society, as the owner of another interest. It is said that this cannot be, because there is a necessary "suspension" during the period of common ownership. But this "suspension" seems to me a partial or temporary merger under another name; and no authority has been cited to me to show that any "suspension" of this kind has ever been recognized. No doubt there is a certain awkwardness in the society, in respect of one interest, giving itself notice in respect of another interest. But, in my view, it is awkwardness only and not impossibility.

The plaintiff's third argument, founded on the alleged imperfection of the actual notice of March 21, 1922, is also, in my judgment, ill-founded. Under the terms of the sub-underlease, it is not a condition precedent that a notice, still less a notice completely valid on the face of it, should be given to determine the underlease. All that is necessary is, that the lessor in the sub-underlease should require to determine it for the purpose of being able to determine the underlease, that is, of course, to determine it subsequently. And here the lessor, the society, did require to determine the sub-underlease for that very purpose. But further, it is not for the plaintiff to examine the actual notice given to determine the underlease, and to take advantage of possible defects, which are not raised by the parties to the underlease. So long as the society, or their trustees for them, accept the view that the underlease was determined by the notice of March 21, 1922, that would appear to conclude the question, and to leave no opportunity to the plaintiff to investigate the matter and to raise technical objections.

Having then come to the conclusion that there was nothing to preclude the giving of an effectual notice to determine the sub-underlease, I have still to consider whether an effectual notice for the purpose was, in fact, given. The notices relied on are those of January 16, 1922, and February 17, 1922, but it is the latter notice, with its accompanying copy letter of the day before, that has practically to be considered.

Here again the objection of the plaintiff is of a very technical character, and with no real merits; it is, that the notice was given by Messrs. Tyler & Co. on behalf of the society, who were the beneficial or equitable owners only, of the leasehold interest under the underlease; and that to be effectual the notice should have been given by or on behalf of the legal owners—namely, the trustees of the society. This argument was the one which was put in the forefront of the plaintiff's case, and on which he mainly relied. But when the facts are once carefully examined, it will, I think, be found to be as unsustainable as those I have already examined.

Not only were the trustees the mere nominees of the society, and bound to act under the direction of the committee of management (subject possibly to provisions in exceptional circumstances, which are not alleged to exist here, for the protection and indemnity of the trustees), but the trustees did, in fact, leave the management of the various interests in this property in the hands of the society and the society's agents. When the transfers from Rice to the trustees of the society took place, Messrs. Tyler & Co. gave notice of the change of landlord on behalf of the society and not of the trustees; and a few days afterwards Messrs. Stilgoe's, the agents who had been collecting the plaintiff's rent on behalf of Mr. Rice, gave notice to the plaintiff that the sale had been made to the society, not to their trustees. For more than a year subsequently, the plaintiff's rent was collected by Messrs. Tyler & Co. as the agents of the society; and when the notices were given to determine the sub-underlease and the correspondence took place, it was throughout the society, and not the trustees, on whose behalf the notices were given, and the correspondence was conducted. It was not till March 31 that the trustees of the society were mentioned, and then only for the purpose of making them formal defendants.

In view of the position of the trustees and of this course of conduct, it is abundantly clear that the trustees, as the legal owners of the property, allowed the society, as the absolute beneficial owners, to have the full management of it, and to deal directly with the plaintiff, and no doubt with the other occupying tenants; and that any notice to terminate given by the society, or by Messrs. Tyler & Co. as their agents, was one given with the full authority of the trustees so far as was necessary. The present case seems to me a much stronger one in this respect than that of *Jones* v. *Phipps* (1), or that of *Browne* v. *Peto.* (2) The case is not one in which the plaintiff was misled, or ran the slightest chance of being misled. As a solicitor, he must have been well aware of the practical identity of the society and their trustees, and there is no suggestion in his evidence to the contrary. Indeed, before the issue of the originating summons, though he raised both the objection of merger and also the objection that the society could not be properly said to "require" to determine the sub-underlease, it never occurred to him to question the position of the society as his real landlords, or their power as such to give the notice to determine. This last point is probably due to the ingenuity of the counsel who settled the summons.

I propose to give affirmative answers to both the questions raised by the summons. The plaintiff must pay the defendants' costs, to be taxed.

Solicitor for the plaintiff: *Chalton Hubbard.*
Solicitors for the defendants: *J. Tickle & Co.*

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(1) L. R. 3 Q. B. 567.

(2) 16 Times L. R. 131.

P. J. B.

In re LORD PENRHYN'S SETTLEMENT TRUSTS.

PENRHYN *v.* ROBARTS.

[1922. P. 1584.]

P. O. LAWRENCE J.
1922
Nov. 29.

Settled Estate—Right of Patronage—Settlement—Compensation for Extinction —Tenant for Life and Remaindermen—Capital Monies arising under Settled Land Acts, 1882 *to* 1890—*Welsh Church Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 91), *ss.* 1, 16.

The sum paid under s. 16 of the Welsh Church Act, 1914, by way of compensation for the extinction of the right of patronage of a benefice subject to a settlement does not belong to the tenant for life, as lay patron, under the settlement, but is payable to the trustees of the settlement as capital.

In the absence of any provision in the Welsh Church Act, 1914, as to the destination of the sum so paid as compensation, the principle stated by James L.J. in *In re Barker* (1881) 17 Ch. D. 241, 243, is applicable.

Adjourned Summons.

By an Indenture of Settlement dated December 5, 1887, certain estates in the county of Carnarvon and elsewhere, and the advowsons or rights of patronage to certain benefices, including the benefice of Glanogwen in that county, were limited, after the death of the late second Baron Penrhyn which occurred in 1907, to the use of the Right Honourable Edward Sholto Baron Penrhyn, the present tenant for life in possession, with remainder to the use of his first and other sons successively in tail male.

The present Baron Penrhyn has had two sons—namely, the Honourable Alan Douglas-Pennant who was never married and was killed in action in October, 1914, and the Honourable Hugh Napier Douglas-Pennant.

By an Indenture dated October 18, 1915, those settled estates were disentailed and, subject to the life estate therein of the present baron and certain family charges thereon, were conveyed to the use of the Honourable Hugh Napier Douglas-Pennant in fee simple, who by a subsequent Indenture of Settlement dated April 23, 1922, made upon his marriage,

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settled the said estates to which he was entitled in fee simple in reversion.

The present Baron and Abraham John Robarts and Henry Hales Pleydell Bouverie are the trustees of the settlement of 1887 and trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, and the same persons are also the trustees of the son's settlement of 1922.

As a result of the provisions of s. 1 of the Welsh Church Act, 1914, the right of patronage in respect of the benefice of Glanogwen became extinguished, and upon the application of Baron Penrhyn as tenant for life and lay patron of that benefice under the settlement of 1887 a sum of 329*l.* was paid by the Commissioners of Church Temporalities in Wales as compensation, under s. 16 of that Act (1), for the extinction of that right of patronage. The Act was silent as to the destination of the sum of money so paid as compensation. Accordingly, Baron Penrhyn took out this summons, to which the trustees of the settlements of 1887 and 1922 were defendants, for the determination of the question whether that sum belonged to the plaintiff as tenant for life under the settlement of 1887, or ought to be paid to the trustees of that settlement, and, if it should be determined that it ought to be paid to those trustees, whether the sum was applicable as capital money arising under the Settled Land Acts, 1882 to 1890.

Austin Lloyd Jones for the tenant for life. Sect. 16 of the

(1) Sect. 16 of the Welsh Church Act, 1914, so far as material, is as follows: "The Welsh Commissioners, if application is made to them within six months after the passing of this Act by or on behalf of any person who or whose predecessor in title was at that date entitled to any right of patronage of any benefice affected by this Act, shall, at the expiration of two years from the date of disestablishment, or, if a vacancy in that benefice occurs after the date of disestablishment but before the expiration of that period, on the occurrence of the vacancy, pay in compensation for the extinction of that right such an amount as the Welsh Commissioners may think just, so however that the total amount paid by way of compensation in respect of any benefice shall not exceed one year's emoluments of the benefice taken on an average of the three years immediately before the passing of this Act: Provided that: (3) A trustee or other person occupying a fiduciary position shall not be bound to make an application under this section."

Act is silent as to the destination of the compensation money, in the event of the right of patronage having been settled. But, having regard to the fact that the only person who is capable of applying for compensation is the tenant for life and lay patron of the benefice and also to the smallness of the sum paid, which, according to the provisions of the Act, may not exceed one year's emoluments, the inference to be drawn is that it was intended that the compensation should belong to the tenant for life.

[P. O. LAWRENCE J. Is not the compensation paid for the extinction of the entire right of patronage?]

The words "that right" in s. 16 for the extinction of which the compensation is paid mean the existing right of the person for the time being entitled to the right of patronage—namely, in this case, the tenant for life. The heading under Part III. of the Act: "Provisions as to existing interests, and compensation therefor," and the marginal notes to s. 14, "Provisions as to existing interests," and s. 16, "Compensation to lay patrons," and the reference in s. 18 to "existing interests" point to an intention of the Legislature to give the compensation to the lay patron existing at the passing of the Act.

T. Howard Wright for the trustees. The Act of 1914 makes no provision for the destination of the compensation money paid in pursuance of s. 16 of the Act. There are no provisions corresponding with those which are to be found for that purpose in the Lands Clauses Consolidation Acts. The right in question is an incorporeal hereditament which was settled and which, like settled land, was capable of being sold under the Settled Land Acts. The compensation is paid for the extinction of the advowson or right of patronage in question, and, having been substituted for that advowson, becomes, on principle, subject to the limitations of the settlement which prior to its extinction affected the advowson. The presumption must be that the Legislature did not intend to interfere with legal rights: the rights of the remaindermen under the settlement were not intended to be overridden. The principle applicable to the present case is stated by James L.J.

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in *In re Barker* (1), and the compensation money ought to be paid to the trustees to be held by them upon the trusts of the settlement of 1887, and the same is applicable as if it were capital money arising under the Settled Land Acts.

P. O. Lawrence J. This summons raises the short point, whether a sum of money paid by way of compensation under the Welsh Church Act, 1914, belongs to the tenant for life or forms part of the capital of the settled estate.

The sum in question was paid in pursuance of the provisions of s. 16 of the Act, in compensation for the extinction, which was brought about by s. 1 of the Act, of the right of patronage of the benefice.

The right of patronage at the date of the passing of the Act stood limited to the uses of the settlement of December 5, 1887, under which the plaintiff, the present Lord Penrhyn, was tenant for life. The plaintiff, as lay patron, applied to the Welsh Commissioners for compensation under s. 16, and the sum in question was paid in pursuance of this application.

The Act is silent as to the destination of the money paid by way of compensation, and makes no provision for the case where the right of patronage is vested in a limited owner.

Mr. Jones for the plaintiff submitted that the Legislature obviously intended that this compensation was to become the property of the tenant for life. He relied, in the first place, upon the fact that the only person who could make the application under s. 16 was the plaintiff, the tenant for life, and, in the next place, upon the small amount of the compensation authorized to be awarded, which under the provisions of the section is not to exceed one year's emoluments of the benefice. He also placed some reliance upon the headings prefixed to the group of sections forming Part III. of the Act, and to the marginal notes to the sections in this group, which he contended pointed to the compensation being payable only in respect of existing interests. His contention

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(1) 17 Ch. D. 241, 243.

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was that, regard being had to these considerations, the Court is bound to infer that the Act intended that the whole of the compensation was to go to the lay patron of the benefice for the time being, although he might only be a tenant for life.

As regards the point made on the headings and marginal notes, I am of opinion that it is well settled that such headings and marginal notes cannot control the enactments themselves, when the latter are expressed in clear and unambiguous terms. It is, I think, plain that the Act does not purport to provide how or by whom the compensation is to be enjoyed, after it has been paid. That is a matter which is left quite at large. Further, there is, in my opinion, no indication in the Act that the Legislature intended to affect the right of any persons entitled to any right of patronage beyond substituting for that right of patronage a right to compensation. Neither the fact that the tenant for life was the proper person to apply for the compensation nor the smallness of the amount of the compensation enable me to draw the inference that the Legislature intended to interfere with the legal rights of the parties interested further than was necessary in order to carry out the object which the Act had in view—namely, the extinction of the right of patronage.

In these circumstances, the question I am asked to decide falls, in my opinion, to be determined on principle. Mr. Howard Wright has referred me to the following passage in the judgment of James L.J. in *In re Barker* (1) as laying down the true principle applicable to such cases as the present—namely: "There seems to me to be a broad general principle underlying all these questions, which is this, where property is taken compulsorily from any person who is not sui juris, and who is not competent to make the subsequent alteration in the disposition or the devolution of that property, which would naturally follow such a change, the presumption is, if the words of the Act of Parliament really admit of that interpretation, that the Legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever."

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(1) 17 Ch. D. 241, 243.

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In my judgment, Mr. Howard Wright is right in his contention that this passage accurately expresses the principle applicable to the present case. Here we have a right of patronage which, at the date of the passing of the Act, was settled in favour of a tenant for life with remainders over. This right was compulsorily extinguished and a sum of money has been paid in compensation for such extinction. Applying the broad general principle referred to by James L.J. the result is that the amount awarded for compensation must be held, as far as possible, upon the same limitations as the right of patronage was held at the date of its extinction. This can best be accomplished by treating it as if it were capital money arising under the Settled Land Acts.

Accordingly, I propose to make a declaration that the compensation, which has been paid, ought to be paid to the trustees of the settlement of December 5, 1887, and held by them upon the same trusts as would have been applicable thereto if it had been capital money arising under the Settled Land Acts.

Solicitors: *Hore, Pattisson & Bathurst, for Carter & Vincent, Bangor, North Wales.*

H. C. H.

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[1922. C. 2598.]

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Oct. 13, 17, 18.

Restrictive Covenant—Benefit not running with the Land—Assignment by Covenantee of all adjoining Land—Enforceability of Covenant against Assign of Covenantor.

Where a restrictive covenant has been entered into by a purchaser of land for the protection of the vendor's immediately adjoining land, but not so as to annex the benefit of the covenant to that land, the covenant is not enforceable against an assign of the covenantor by the executors of the covenantee if he had disposed of the whole of the adjoining property before his death. It can make no difference even when the executors are persons to whom part of the covenantee's property had previously been assigned without an express assignment of the benefit of the covenant:—

Semble that the covenantee himself could not enforce the covenant against an assign of the covenantor after he had parted with all the adjoining property.

Formby v. *Barker* [1903] 2 Ch. 539 and *London County Council* v. *Allen* [1914] 3 K. B. 642 applied.

Ives v. *Brown* [1919] 2 Ch. 314 and *Lord Northbourne* v. *Johnston & Son* [1922] 2 Ch. 309 distinguished.

WITNESS ACTION.

By deed dated March 15, 1884, John Bullbrook conveyed to Humphrey Wood for valuable consideration a strip of land lying on the west side of Cambridge Terrace, Chatham. The deed contained covenants in the following terms: "The said Humphrey Wood for himself his heirs executors and assigns hereby covenants with the said John Bullbrook his heirs executors and administrators that no dwelling house to be erected on the said piece of land hereby conveyed shall be used as a shop and every such dwelling house shall be of not less value than 300*l*. . . . . and shall not nor will carry on or permit to be carried on in or upon the said piece of land or any messuage or other building to be erected thereon any trade or business of a noisome or offensive nature and will not do or permit to be done on the said premises any act matter or thing which may be or become a nuisance to the tenants or prejudicial to the value of the houses belonging to the said John Bullbrook in Cambridge Terrace adjacent to the said premises And that except and until the said piece of land is built upon either as hereinbefore provided for or by the erection thereon of a greenhouse the same shall be used as and for garden purposes only."

In 1882 John Bullbrook had acquired a large piece of land at Chatham, which included the strip of land comprised in the conveyance of March 15, 1884. On this piece of land he had made Cambridge Terrace, which was a cul de sac, and had built along the east side of it eleven houses, Nos. 1 to 11 Cambridge Terrace. Before the date of the conveyance he had disposed of Nos. 1 and 11 Cambridge Terrace. The strip of land conveyed to Humphrey Wood was immediately opposite Nos. 8, 9 and 10 Cambridge Terrace.

By an indenture of settlement dated March 16, 1889, John Bullbrook conveyed Nos. 8, 9 and 10 Cambridge Terrace to the plaintiffs and John Smith Benton, since deceased, upon trusts for the benefit of his son and his son's wife and children as therein mentioned. John Bullbrook died on November 28, 1898, and by his will he appointed the plaintiffs and John Smith Benton to be his executors, all of whom proved his said will. Before the date of his death John Bullbrook had parted with all his houses in Cambridge Terrace.

By his will dated December 11, 1903, Humphrey Wood devised the strip of land to the west of Cambridge Terrace to Harry Roberts by whom it was conveyed in 1914 to the defendants with notice of the covenant in the deed of March 15, 1884.

In May, 1922, the defendants began to erect four private lock-up motor houses or garages on this strip of land. By arrangement the four motor houses were completed during the course of this action, but were not made use of. They were each of a size to be used by one motor car only.

On June 12, 1922, the plaintiffs commenced this action, and at the hearing claimed (1.) a mandatory injunction for the removal of the four motor houses on the ground that their erection was a breach of the covenants in the conveyance of March 15, 1884; and, alternatively, (2.) an injunction to restrain the defendants from using the four motor houses as garages or otherwise from doing or permitting to be done on any part of the strip of land any matter or thing constituting a nuisance to or prejudicially affecting the value of the premises in Cambridge Terrace.

The plaintiffs originally sued only as the surviving trustees of the indenture of settlement of March 16, 1889, but were given leave to amend at the trial, so as to sue also as the surviving executors of John Bullbrook's will.

The case is only reported on the point of law whether the plaintiffs had any right to sue for breach of the covenant.

Greene K.C. and *Church* for the plaintiffs. The plaintiffs are entitled to sue the defendants on the covenant in the deed of March 15, 1884, as being the present owners of land to which the benefit of the covenant was annexed: *Reid* v. *Bickerstaff* (1); *Rogers* v. *Hosegood*. (2)

[SARGANT J. A restrictive covenant may be entered into for the benefit of property in the vendor's possession and yet not be intended to run with the land so as to prevent the vendor's releasing the covenant.]

That applies mainly to the development of large estates: *Renals* v. *Cowlishaw*. (3) Here there is a compact row of houses retained by the vendor and fronting the strip of land conveyed. There is an overwhelming presumption that the covenant was intended to benefit each house and the words of the covenant suffice to annex the benefit in express terms to the houses belonging to John Bullbrook in Cambridge Terrace. The words "belonging to the said John Bullbrook" are mere words of description identifying the property and do not show that the benefit of the covenant was to be personal to him.

Even if the benefit of the covenant is not annexed to the land, the plaintiffs can still enforce it as executors of John Bullbrook. Had the executors been different persons from the trustees under the deed of March 16, 1889, they could

(1) [1909] 2 Ch. 305.

(2) [1900] 2 Ch. 388.

(3) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.

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have assigned the benefit of the covenant to them before action brought or joined with them to enforce it: *Ives* v. *Brown* (1); *Lord Northbourne* v. *Johnston & Son.* (2) The plaintiffs can therefore sue on the covenant.

If so, the plaintiffs are entitled to the mandatory injunction asked for on the ground that the erection of the motor houses is a breach of the covenant; and alternatively to an injunction quia timet to prevent use so as to be a nuisance to the tenants or prejudicial to the value of the houses.

A. Grant K.C. and *Harman* for the defendants. The erection of the motor houses is not a breach of the covenant and there is no evidence that the user of the motor houses will permanently be prejudicial so as to entitle the Court to grant an injunction quia timet: *Fletcher* v. *Bealey.* (3)

In any case the plaintiffs have no right to sue. As matter of construction the benefit of the covenant has not been annexed to the houses in Cambridge Terrace. *Rogers* v. *Hosegood* (4) has therefore no application and the case falls within the principle of *Renals* v. *Cowlishaw* (5): see also *Master* v. *Hansard.* (6) The covenant was for the personal benefit of the covenantee in connection with his ownership of the adjoining houses. It follows that the plaintiffs as assigns of some of the houses without the benefit of the covenant cannot sue.

Nor can they sue in their combined capacities of owners of the property and executors of John Bullbrook. This case is distinguishable from *Ives* v. *Brown* (1) and *Lord Northbourne* v. *Johnston & Son* (2) in that the covenantee had before his death parted with all the property for the benefit of which he caused the covenant to be entered into. The covenant was in gross for the benefit of the covenantee to enable him to deal advantageously with his houses. As soon as they were all sold the covenant became unenforceable against an assign of the covenantor: *Formby* v. *Barker* (7);

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(1) [1919] 2 Ch. 314.
(2) [1922] 2 Ch. 309.
(3) (1884) 28 Ch. D. 688.
(4) [1900] 2 Ch. 388.
(5) 9 Ch. D. 125; 11 Ch. D. 866.
(6) (1876) 4 Ch. D. 718.
(7) [1903] 2 Ch. 539.

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London County Council v. *Allen.* (1) The equitable doctrine which alone enables a covenantee or his executors to enforce a covenant against the assign of the covenantor does not apply when once the covenantee has parted with the land for the benefit of which, whilst in his hands, the covenant was obtained.

Greene K.C. in reply. *Formby* v. *Barker* (2) and *London County Council* v. *Allen* (1) only show that a covenant such as the present one cannot be enforced except in connection with the land for the benefit of which it was obtained. A purchaser of the covenantee's land can enforce it against the assign of the covenantor, if he obtains at any subsequent time an assignment of the benefit of the covenant. That is in effect the plaintiffs' position here, for the land and the benefit of the covenant are both vested in them, although in different capacities. The defendants' case must be that the benefit of the covenant and the land to be benefited by it must be kept together ab initio and that when once they are divided, the covenant is gone. This goes beyond *Formby* v. *Barker* (2) and *London County Council* v. *Allen* (1) and is contrary to *Ives* v. *Brown.* (3) The plaintiffs are therefore entitled to relief.

SARGANT J. In this action the plaintiffs, who are the owners of the freehold of three houses numbered 8, 9 and 10 Cambridge Terrace, Chatham, are suing the defendants, who are the owners of a strip of land opposite, which was formerly garden ground, for two purposes. The first purpose is to cause the defendants to pull down four lock-up motor houses or garages which have been built opposite the plaintiffs' houses. The second object of the action is to restrain the defendants from using the buildings in question for the purposes for which they were built, so as to constitute a nuisance to, or prejudicially affect the value of, the houses belonging to the plaintiffs. The whole relief is, of course, based not on common law right or anything of that kind,

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(1) [1914] 3 K. B. 642.

(2) [1903] 2 Ch. 539.

(3) [1919] 2 Ch. 314.

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but on the special terms of a covenant contained in a conveyance dated March 15, 1884, which was given by the plaintiffs' predecessor in title to the defendants' predecessor in title.

The defences raised by the defendants are several in number. The first defence is that, whether or not what has been done by the defendants is a breach of the covenant contained in that conveyance, the plaintiffs have no right to sue the defendants on the covenant. That is a pure question of law. The second defence is that the erection of the buildings in question by the defendants is not a breach of any covenant contained in that indenture on its true construction. That is a question of the construction of the particular covenant. If the defendants are right in their second contention and wrong in the first, the plaintiffs will not be entitled to a mandatory injunction calling upon the defendants to pull the buildings down. The defence to the other claim for an injunction is that the intended user in the future of these motor houses will not be a nuisance to the plaintiffs, and will not prejudicially affect the value of the houses in question. That is a contention with reference to the future. I should say that although the buildings have been erected, pending the trial of the action they have not been let or used as lock-up motor houses or garages by virtue of an arrangement made between the plaintiffs and the defendants and, of course, an undertaking by the plaintiffs to be responsible, if they fail in the action, for the damage occasioned to the defendants by the non-user.

It seems to me that I had better deal with the defence on the question of law first, for the reason that if I dealt with the case on the facts and decided adversely to the plaintiffs I might not be disposing finally of the claims of the plaintiffs against the defendants. It might still be that, although the plaintiffs were not entitled to any immediate injunction against the defendants, yet the defendants would be open to attack in the future, should the actual user of their buildings prove to be a greater nuisance or more prejudicial than they say is likely to be the case. Having come therefore to the conclusion that the defendants are right upon the first branch of the defence I think I ought to deal with it first. [His Lordship then stated the facts, and after pointing out that Cambridge Terrace was situated in a central part of Chatham, but that the roadway in question was a cul de sac, so that the houses had the advantage of being of quite a residential nature, and enjoyed great quiet, continued :] The covenant in the conveyance of March 15, 1884, was only an obligation as between the parties to that document. That being so, how does the law stand ? Are the plaintiffs entitled to the benefit of this restrictive covenant and to enforce it not against the covenantor, but against his assignees taking with notice of the covenant ?

The way in which it is first put on behalf of the plaintiffs is that the terms of the covenant in the indenture of March 15, 1884, are such as to point out definitely the nine houses of Mr. John Bullbrook, including the three now owned by the plaintiffs, as the land to which the benefit of the covenant was definitely annexed. It is said therefore that the covenant would operate by way of equitable easement and would enure for the benefit of each one of the owners of the nine houses retained by Mr. Bullbrook at the date of the conveyance ; or, to put it more technically : that this is a case within the doctrine of the well-known case of *Rogers* v. *Hosegood.* (1) That is a question depending on the construction of the covenant. In my judgment this case is not one in which the benefit of the covenant was intended to be or was annexed to the nine houses in question. It seems to me to be a case, on the clear language of the document, where Mr. Bullbrook was not intending to annex the benefit of the covenant to these definite houses, so that it would pass to any purchaser from him of any one of the houses, but was obtaining a covenant which would be of use to him for the protection of his houses in his own hands and for enabling him to dispose of the houses advantageously to anybody with whom he might deal in the future. It seems to me that the case is one exactly within the principle

(1) [1900] 2 Ch. 388.

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of *Master* v. *Hansard* (1), where Bramwell L.J. stated the effect on his mind of the covenant in the following terms: "But when I look at the facts of this case I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors, to enable them to make the most of the property which they retained." So here it seems to me that in this case the object of the covenant was to enable Mr. Bullbrook to protect his property while he retained it, and make the most of it when he disposed of it. Of course, in that state of things, it might have been competent for Mr. Bullbrook to realize the benefit of the covenant by stipulating with the purchaser of any of the houses from him that he, the purchaser, should have the benefit of the covenant assigned to him; and he might, in that way, have obtained a better price from the purchaser. The possibility of that being done is recognized in *Renals* v. *Cowlishaw.* (2) But that Mr. Bullbrook did not intend definitely to annex the benefit of this covenant to each one of these nine houses I am perfectly satisfied.

The next way in which it is put is that, as the plaintiffs happen to be both the assigns of Mr. Bullbrook by virtue of the settlement of 1889 and also the legal personal representatives of Mr. Bullbrook, they are entitled to be placed in the same position that Mr. Bullbrook was in, and themselves to sue in respect of the covenant. I am assuming now that the case is within *Renals* v. *Cowlishaw* (2) and that the covenant is one which could be assigned and might have been made to pass to a purchaser of the land. This point is dealt with, or, at any rate, is very nearly dealt with, in *Formby* v. *Barker* (3) and *London County Council* v. *Allen* (4), because, be it observed, at the time when Mr. Bullbrook died he had entirely disposed of all the property for the benefit of the development and disposal of which he had, on the view I have taken of the covenant, caused the covenant to be entered into. The covenant having been entered into to enable him to dispose to advantage of the property, that

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(1) 4 Ch. D. 718, 724.

(2) 9 Ch. D. 125; 11 Ch. D. 866.

(3) [1903] 2 Ch. 539.

(4) [1914] 3 K. B. 642.

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result had, in fact, been obtained. He had disposed of the whole of the property at the time of his death, and, therefore, at the time of his death he had no real estate for the advantage of which it was that he should enforce the covenant. In that state of things does the equitable doctrine that a restrictive covenant can be enforced against an assign of the covenantor apply ? Is it applicable to a case where the covenantee has, in process of time, got rid or disposed of the whole of the property which he had at the date of the covenant, and for the benefit of his dealing with which he caused the covenant to be entered into ?

Formby v. *Barker* (1) and *London County Council* v. *Allen* (2) were both cases in which, at the date of the covenant, the covenantee retained no property at all to be aided by the enforcement of the covenant. In *Formby* v. *Barker* (1) the vendors had land and sold the whole of it without retaining any portion. In *London County Council* v. *Allen* (2) the London County Council had never had any land ; they were not selling any land, but were in the position of persons taking a merely personal covenant. This case differs from both of those in that at the date of the covenant the covenantee retained the property for the development of which he was causing the covenant to be entered into, and it was only subsequently that he disposed of the land. But although there is that marked distinction between *Formby* v. *Barker* (1) and *London County Council* v. *Allen* (2) on the one hand and this case on the other, yet I think that in principle both *Formby* v. *Barker* (1) and *London County Council* v. *Allen* (2) apply to the present case. I think that the effect of the reasoning in both those cases, if it is considered carefully, is that the equitable doctrine enabling restrictive covenants to be enforced against assigns with notice ought not to be extended in derogation of the ordinary rights at common law of purchasers, and that it ought to be applied only where it is sought to enforce the covenant in connection with the enjoyment of land that the covenant was intended to protect. That appears to me to apply quite as much to a case where the original covenantee retained land at the date of the covenant and he or his successors got rid of the whole of it afterwards, as to a case where the original covenantee either had no land or had no land which he was retaining. It is pointed out in *Formby* v. *Barker* (1) that otherwise the result might be that a covenant, which had ceased to have any value in the hands of the covenantee or his express assigns for the purpose of protecting land, might go down through an infinite series of successions to legal personal representative after legal personal representative, without there being during the whole of that time any land in respect of which the benefit of the covenant was enforceable; and it is pointed out that if this were possible, it would be an enormous extension of anything that was ever contemplated when the doctrines of equity with regard to the enforcement of restrictive covenants were laid down.

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(1) [1903] 2 Ch. 539.

(2) [1914] 3 K. B. 642.

I will not go at length through the reasoning either in *Formby* v. *Barker* (1) or *London County Council* v. *Allen* (2); but that seems to me to be the result of the reasoning in those two cases. They differ indeed in one respect. The principle of *Formby* v. *Barker* (1) would only prevent the executors of a covenantee who has disposed of his land from suing an assign of the covenantor; the principle of *London County Council* v. *Allen* (2) would prevent the covenantee himself, after he had disposed of his land, from suing such an assign. If the latter principle is applied so that in this case Mr. John Bullbrook himself could not have proceeded on the covenant after he had disposed of his houses in Cambridge Terrace, then it seems to me that a fortiori it is impossible for his executors subsequently to sue on the covenant. But assuming that Mr. John Bullbrook himself could have sued, it by no means follows—and *Formby* v. *Barker* (1) lays the contrary down quite clearly—that the executors of Mr. John Bullbrook could sue after his death, seeing that he did not possess at the time of his death any of the land for the benefit of the development of which he had caused the covenant to be entered into.

(1) [1903] 2 Ch. 539.

(2) [1914] 3 K. B. 642.

Against the view that I am expressing Mr. Greene has pressed upon me two decisions of my own: *Ives* v. *Brown* (1) and *Lord Northbourne* v. *Johnston & Son* (2), but after having carefully considered those cases I do not think they really apply to the case now before me. In each of those cases the covenants were entered into for the purpose of subsequent beneficial development of a large estate, and at the time when the person entitled to the estate and to the benefit of the covenants died there was a large amount of property still remaining undeveloped; and for its development it would be necessary to make use of the covenants. That differs altogether from a case where at the time when the covenantee dies the whole of the estate in respect of which the covenant was entered into has been dealt with and disposed of by the covenantee, and he has no further interest in the enforcement of the covenant so far as any land is concerned. That difference between those two cases and the present case is a marked one, and in my judgment those two cases afford no reason for saying that either Mr. John Bullbrook just prior to his death, or the executors of Mr. John Bullbrook after his death, could successfully sue to enforce the benefits of the covenant against assigns of the covenantor.

It has been said that a difference is made by the circumstance that the plaintiffs happen to be not only the executors of John Bullbrook, but also the trustees of three of the houses in Cambridge Terrace; so that the land and the benefit of the covenant are reunited in the same persons. I do not think that really makes any difference. When once Mr. John Bullbrook and his executors as such had ceased to be entitled to enforce the covenant by reason of his having parted with the whole of the houses in Cambridge Terrace, I do not think any subsequent reunion in the same persons of the executorship to John Bullbrook and the ownership of the houses could affect the position. It could not put them in any better position than if the executors and the assignees of the land were two separate sets of people and they combined

(1) [1919] 2 Ch. 314.

(2) [1922] 2 Ch. 309.

to sue on the covenant. If they had come to sue together there would have been an effective answer to each set of plaintiffs, and the fact that the two sets of plaintiffs are in fact united in the same two individuals, does not, in my judgment, make any difference. I hold therefore that the plaintiffs have no right to sue on the covenant at all.

That really disposes of the action, but, of course, there may be an appeal, and I think it right therefore that I should express my view on the rest of the plaintiffs' case on the basis that I am wrong in the conclusion to which I have come, and that there is a right to sue. On this hypothesis I have to consider whether the defendants have done anything which is a breach of the covenant. As I have said, there are two breaches of the covenant which are sought to be enforced: one, the alleged breach of the prohibition against building, and the other, the probable future breach of the prohibition in regard to the user of the buildings. [His Lordship proceeded to consider the words of the covenant and held that on its true construction the erection of the motor houses did not constitute a breach. He held further that there was no sufficient evidence that the user of the motor houses would be necessarily prejudicial to the value of the plaintiffs' houses, so as to entitle the plaintiffs to an injunction quia timet to restrain the defendants from using them so as to affect prejudicially the value of the plaintiffs' houses.]

In my judgment, therefore, I ought to dismiss this action, and, of course, dismiss it with costs.

Solicitors: *W. A. E. Headley, for Norman & Stigant, Chatham; F. J. Berryman, for W. A. Watson, Chatham.*

H. C. G.

In re LEACH.

MILNE *v.* DAUBENY.

EVE J.
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Dec. 1.

[1922. L. 1101.]

Will—Construction—Legacies—Appropriated Sums for settled Legacies—Priorities—Deficiency of Assets—Abatement—Legacies to Executors—Costs of packing and delivering specific Legacies.

A testatrix gave legacies of 100*l.* to each of her executors and trustees and then bequeathed all her plate, jewellery, ornaments, china, and other household effects to two specific legatees absolutely. The whole of her residuary property of every kind she devised bequeathed and appointed to her trustees upon trust to sell and out of the proceeds First, to pay her funeral and testamentary expenses, debts, and the legacy duty; Secondly, to appropriate and set apart two sums of 4000*l.* and 2000*l.* to be held upon certain trusts for life and then over; and Thirdly, to pay a number of pecuniary legacies, including one of 600*l.* And the testatrix declared that should her residuary personal estate be insufficient to pay all the legacies then the legacy of 600*l.* should be reduced to 500*l.*; and every legacy and annuity was bequeathed free of legacy duty. There was a deficiency in the estate:—

Held, (i.) that there were sufficient indications in the will that the testatrix intended the distribution of her estate to be in accordance with the priorities mentioned, and the settled legacies must be paid in full before all the other pecuniary legacies. (ii.) That the legacy of 600*l.* must be reduced to 500*l.*, and this reduced legacy, plus the duty, must abate pro rata with the other postponed legacies, including those to the executors. (iii.) That the costs of packing and delivering specific legacies must be borne by the specific legatees.

In re Sivewright [1922] W. N. 338 followed.

ADJOURNED SUMMONS.

By her will, dated August 12, 1916, Mary Matilda Leach, of Harley Lodge, Wallington, in the county of Surrey, appointed the plaintiffs, Frank Alexander Milne and Sir William Joynson-Hicks, her executors and trustees, and gave to each of them in the event of his proving her will and acting in the trusts thereof 100*l.* She gave and bequeathed to the defendants Mary Elizabeth Stolterforth, and Grace Lynn Joynson-Hicks, the wife of Sir William Joynson-Hicks, all her plate, jewellery, ornaments, china, glass, furniture, books, pictures, and other household effects absolutely. The testatrix then gave, devised, and bequeathed, and also in exercise of the powers given to her by an indenture of settlement dated February 11, 1865, and another indenture of settlement dated March 25, 1873, she appointed all her property of what nature or kind soever not thereinbefore specifically bequeathed unto and to the use of her trustees their heirs executors administrators and assigns according to the nature and tenure thereof respectively upon trust to sell, and out of the proceeds First, to pay her funeral and testamentary expenses and debts, and to pay the legacy duty thereinafter mentioned; Secondly, to appropriate and set apart two sums of 4000*l.* and 2000*l.* to be held upon the trusts thereinafter declared concerning the same; and Thirdly, to pay the pecuniary legacies thereinafter bequeathed; and to pay the residue to her cousins, the defendants Walter Hungerford Daubeny, Edward Mainwaring Daubeny, and Henry Graham Daubeny, in equal shares. And the testatrix declared that her trustees should stand possessed of the said sum of 4000*l.* and the investments thereof upon trust as to one equal moiety thereof to pay the income to her said cousin, Walter Hungerford Daubeny, during his life, and after his death, or upon the happening of any event upon which the income should become payable to any other person, upon trust as to both capital and income to hold the same upon trust for four of his children therein named in manner therein mentioned; and as to the other moiety of the 4000*l.* the trustees were to stand possessed thereof upon trust for such of the said four children of W. H. Daubeny as should survive her. And the testatrix declared that her trustees should stand possessed of the sum of 2000*l.* and the investments thereof upon trust to pay the income to her servant, Hepzibah Jane Smithers, during her life, and after her death upon trust to pay and divide the sum between various specified charities. The testatrix then gave numerous pecuniary legacies to individuals, including one of 600*l.* to the defendant Hebe Gwerneryn Paulet Hunter (subject to reduction in the event thereinafter specified) and also charitable legacies, after which she declared that should her residuary personal estate be insufficient to pay all the legacies thereinbefore bequeathed, then the legacy of 600*l.* to

H. G. P. Hunter should be reduced to 500*l.*; and the testatrix further declared that every legacy and annuity thereinbefore bequeathed was bequeathed free of legacy duty, which was to be paid out of her general estate.

The testatrix died on March 5, 1922, and her will was proved on April 8, 1922. At the time of her death the testatrix possessed plate, jewellery, ornaments, china, glass, etc., and other household effects of the value of 667*l.* 9*s.* 6*d.*, which were at the date of her death in her home at Wallington. Apart from the plate, jewellery, and other effects bequeathed to M. E. Stolterforth and Dame G. L. Joynson-Hicks and a sum of 150*l.* owing to the estate the present value of the personal estate of the testatrix was 6743*l.* or thereabouts. The trust funds subject to the trusts of the two settlements referred to in the will amounted to 3416*l.* The total value of the estate available for legacies was 10,159*l.*, whilst the total of the legacies bequeathed and sums (apart from the legacy duty) directed to be appropriated or set apart, amounted to 12,300*l.*

The debts of the testatrix amounted to 134*l.* There was thus a deficiency of assets and abatement became necessary.

The questions asked upon an originating summons taken out by the trustees were (inter alia):—

1. Whether, upon the true construction of the will any, and if so which of the legacies and sums by the will given or directed to be appropriated or set apart (including the legacy duty thereby directed to be paid) ranked in priority to any other or others, and if so which; or whether all the legacies and sums were payable pari passu and ought to abate rateably on a deficiency of assets.

2. Whether the legacy of 600*l.* to H. G. P. Hunter was liable to abate by 100*l.* and no more, or ought to be a legacy of 500*l.* only and abate as such.

5. Whether the defendants, M. E. Stolterforth and Dame G. L. Joynson-Hicks, were entitled to have the reasonable costs of packing and delivering the plate and other articles at their own homes paid out of the estate of the testatrix.

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Evelyn Riviere for the executors and trustees. The legacies to the executors take priority over all the other legacies. There is no provision made in the will for payment of these legacies at all.

Bryan Farrer for W. H. Daubeny who took a life interest in the first sum of 2000*l.* I do not rely upon the statement of the words "first," "secondly" and "thirdly" as sufficient by themselves to fix the priorities. But the testatrix obviously contemplated that there might be a deficiency in her estate, and this fact, coupled with the words of enumeration, indicate an intention of fixing priorities. A third indication is the mode in which the testatrix directed that the sums of 4000*l.* and 2000*l.* should be appropriated and set apart to provide for the settled legacies before any gifts of the numerous pecuniary legacies were made: *Miller* v. *Huddlestone.* (1) It is admitted that the onus of proving the intention to confer priority is upon those claiming it. Otherwise the general rule of equality of all legacies would apply. In *In re Harris* (2) words of a similar character to those in the present case were used—namely, "in the first place," "in the next place" and "after payment thereof"; and Warrington J. said (3) that the real point to be determined was whether the testator had indicated by his will that he was doubtful whether he had left sufficient assets to pay all the legacies, and had therefore contemplated a possible failure of some of them, and for that reason directed the priorities in a legal sense which the legatees were to enjoy among themselves. So in *Gyett* v. *Williams* (4) a sum of 2000*l.* directed to be laid out in the purchase of an estate to be held on trust was held to have priority over all other gifts. Again, in *In re Hardy* (5) Malins V.-C. held that certain settled legacies given "in the first place" and "in the next place" had priority over the other legacies subsequently bequeathed, and, while agreeing that in *Beeston* v. *Booth* (6) the words "in the first place" and "in the next place" did not have the effect of

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(1) (1851) 3 Mac. & G. 513.
(2) [1912] 2 Ch. 241, 248.
(3) [1912] 2 Ch. 248.
(4) (1862) 2 J. & H. 429, 440.
(5) (1881) 17 Ch. D. 798, 805.
(6) (1819) 4 Madd. 161.

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giving priority, the Vice-Chancellor went on to say that where money was directed to be laid out on land or other securities it was an indication of an intention to give priority. In the present case, taking all the indications together and especially having regard to the contemplation by the testatrix of a possible deficiency, there is sufficient proof of her intention that the estate should be distributed according to the indicated priorities. These settled legacies therefore should be provided for in full before all the pecuniary legacies.

F. K. Archer for pecuniary legatees. On the authorities the words "first," "secondly," "thirdly" are mere words of enumeration. Here the fund is a mixed fund, and while it is contemplated that a deficiency may occur, that is provided for by the abatement directed of the 600*l.* legacy. The Court must be convinced of the testatrix's intention before declaring that there are priorities, it is not enough to be only doubtful of the intention: *In re Harris.* (1) *Thwaites* v. *Foreman* (2) is an authority in my favour. On the whole there is not sufficient in the present will to take it out of the general rule that all bequests stand on an equal footing, and it is for those who assert the contrary to prove it.

Kenneth Swan for the legatee of 600*l.* This legacy should not abate more than to 500*l.*, that is the ultimate limit.

H. M. Broughton for the two specific legatees of plate, etc., on the authority of *In re Hewett* (3) the expenses of packing and forwarding the specific bequests should be borne by the general estate and not by the specific legatees. There are conflicting authorities on the point.

EVE J. The first question is whether the testatrix intended any of the legacies bequeathed by her will to be paid in priority to the other legacies and in order to answer that question it is necessary to find out what indications there are in the will of such intention and what is their net result. Three are relied upon by those who claim priority: first, the expressions "first," "secondly" and "thirdly"; secondly, the clause showing that the testatrix contemplated the possibility of her estate being insufficient to discharge all the legacies; and thirdly the terms in which she provided for the settled legacies. Mr. Bryan Farrer argues that the presence of the clause indicating that the testatrix contemplated a possible insufficiency of her estate imposes on the expressions "first," "secondly" and "thirdly" a more effective meaning than that of mere enumeration, in short, that, read in conjunction with that clause, they must be construed as fixing priorities. This conclusion he contends is supported by the directions as to the setting aside of the settled legacies.

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(1) [1912] 2 Ch. 241, 248.

(2) (1844) 1 Coll. 409, 414.

(3) [1920] W. N. 366; 90 L. J. (Ch.) 126.

The conclusion at which I have arrived on the whole will, is that the testatrix did intend the settled legacies to be provided for in priority to the other pecuniary legacies. It is a question of intention and it lies on those who assert priority to establish it. I think the cumulative effect of the three indications I have mentioned does show that the testatrix intended the distribution of her estate to be in accordance with the priorities indicated by the expressions "first," "secondly" and "thirdly," and accordingly that the settled legacies must be paid before any funds are available for the others. In each case the legacy duty must be added to the legacy. As to Miss Hunter's legacy, this in the event that has happened must be reduced to 500*l.*

I do not think the testatrix intended this reduction to be in substitution for any abatement. The effect is that 500*l.* must be inserted instead of 600*l.* after the words of gift, and this reduced legacy plus the duty must abate pro rata with the other postponed legacies. The legacies to the executors must also abate rateably with the others.

As to the costs of packing and delivering specific legacies of jewellery and china, I must follow my own decision in *In re Sivewright* (1), where also there was a deficient estate,

(1) [1922] W. N. 338.

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and hold that these costs must be paid by the specific legatees. If the decisions on this point are in conflict it is for a higher Court to determine what the law is.

Solicitors: *Joynson-Hicks & Co.; Stow, Preston & Lyttelton; Harratt & Pollock.*

G. M.

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Nov. 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 21.

HOARE AND COMPANY *v.* McALPINE.

[1921. H. 4815.]

Nuisance—Vibration—Structural Damage—Old Building—Rule in Rylands v. *Fletcher.*

In preparing a site for a large building in the heart of the City, the defendants drove a very large number of piles into the soil, thereby setting up such a heavy vibration as to cause serious structural damage to an old house belonging to the plaintiffs, with the result that the greater part had to be taken down in compliance with a dangerous structure notice.

The plaintiffs sued for damages:—

Held, that the principle of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, 338–340 as explained in *National Telephone Co.* v. *Baker* [1893] 2 Ch. 186, 199 and *Attorney-General* v. *Cory Bros.* [1921] 1 A. C. 521, 539 applied so that even if, as the defendants alleged, the plaintiffs' house was in an abnormally unstable condition, the defendants were responsible as insurers for all damage caused by the escape of the vibration they had so created.

Held, however, on the actual facts that the plaintiffs' house though very old was not in such an abnormally unstable condition as to prevent the vibration being treated as an ordinary actionable nuisance.

Walter v. *Selfe* (1851) 4 De G. & Sm. 315, 322; *Grosvenor Hotel Co.* v. *Hamilton* [1894] 2 Q. B. 836, 840, 841; *Robinson* v. *Kilvert* (1889) 41 Ch. D. 88, 94, 96, 97; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways* [1902] A. C. 381, 392, 393; and *Kine* v. *Jolly* [1905] 1 Ch. 480, 489 discussed.

WITNESS ACTION.

The plaintiffs Hoare & Co. were the lessees of an ancient hotel on the north side of Lower Thames Street, the lease of which had eight years to run. The plaintiff Jarvis, a licensed victualler, was the tenant in occupation.

The hotel had a basement, ground floor and four upper floors. As originally constructed, over a hundred years ago, it had an interior cross-wall from the basement to the top floor. This cross-wall was chased into the southern and northern main walls, but not bonded. At the north side the building had certain tie-plates tying it into the wall separating it from an adjoining building on the north. This was the mode of building then recognized.

About fifty years ago the southern portion of the cross-wall on the ground floor was removed for the improvement of the bar, and replaced by three iron columns to support the upper floors; and the front main wall was supported by a bressumer carried on several storey posts. A small settlement then occurred and the two southern columns and a front pier acquired a small south list. This pier called pier J was part of the original brickwork, running from the ground floor to the bressumer, and, owing to the storey posts, it carried very little weight. In order to make the front of the hotel look vertical a veneer of brickwork was inserted, and pier J was covered with wood. The building with these three lists then came to rest, and so remained for fifty years in spite of the heavy traffic and the air raids, and all the walls above the bressumer remained vertical.

In November, 1919, the remaining portion of the internal cross-wall on the ground floor became unsafe, and it was rebuilt under the direction and supervision of the district surveyor. He noticed the old lists in the columns, but did not think they made the building dangerous, the storey posts and the main walls above the bressumer being quite vertical. He did not actually notice the list in pier J nor the bad state of repair of a north-east pier, these piers being covered with woodwork, but as they carried little weight, these defects were of small importance. After the district surveyor's requirements were carried out early in 1920 he considered that the building was reasonably sound having regard to its class and age.

In November, 1920, the defendants, who were contractors for the erection of a large building on the south side of Lower Thames Street, immediately opposite the hotel, commenced driving a very large number of piles in the preparation of the site. The hotel soon showed signs of serious structural damage, which the plaintiffs attributed to the very heavy vibration undoubtedly caused by the pile-driving.

On June 30, 1921, a dangerous structure notice was served calling attention to various defects, including the state of the north-east pier, requiring the building to be made secure, and to be shored up as necessary. The building was then shored up. At this date there was a south bulge in the upper wall, the storey posts were out of plumb to the south, and various cracks had opened.

On January 31, 1922, the building above the ground floor was ordered to be taken down in pursuance of a fresh dangerous structure notice of January 16. As more than half the building had to be taken down in compliance with this order, any re-erection would be a new building and would have to be set back to the present building line, which would only give the plaintiffs a depth of nine feet.

On November 23, 1921, the plaintiffs commenced this action for damages.

The defendants, besides denying that the vibration had or could have caused any structural damage, said that if any such damage had been caused it was due to the abnormally unstable character of the plaintiffs' building, in which case they submitted as a matter of law that the nuisance was not actionable.

The legal point is alone reported.

Tomlin K.C. and *J. F. Carr* for the plaintiffs. Before the defendants' operations, our building was in fact normally stable. But whatever its condition the defendants had no right to shake it down. They have created a dangerous force or vibration on their own land by operations quite unsuitable in the heart of the City and are responsible in trespass or case for all damage caused by its escape: *Rylands* v. *Fletcher*. (1)

Upjohn K.C., *Farwell* and *A. T. Mathew* for the defendants. Vibration cannot cause structural damage, at any rate to

(1) L. R. 3 H. L. 330, 338–340.

a normally stable building. Any damage in the present case was due to the abnormally unstable character of the building.

The plaintiffs are not entitled to interfere with the normal use of their neighbour's property by maintaining a ramshackle building on their own land. This building was about as stable as a house of cards.

This is simply an action of nuisance. It is not enough to prove damage. The plaintiffs must make out an actionable nuisance. In other words they must make out such a nuisance as would affect normal persons or buildings of normal stability: *Walter* v. *Selfe* (1); *Grosvenor Hotel Co.* v. *Hamilton* (2); *Robinson* v. *Kilvert* (3); *Eastern and South African Telegraph Co.* v. *Cape Town Tramways* (4); *Kine* v. *Jolly.* (5)

Now after the alterations and consequent lists of fifty years ago the building was always in a critical condition, and evidently required constant watching. It was patched up early in 1920, but the lists were not remedied. After the dangerous structure notice of June 30, 1921, it was manifest that a good deal required to be done. But beyond shoring, little if anything was done. The building was left in a thoroughly unstable condition and the plaintiffs cannot therefore make out an actionable nuisance.

Tomlin K.C. in reply. This is not a case of ordinary nuisance involving the condition that the act complained of must be a nuisance to normal persons or property. It is really an action of trespass or trespass on the case.

The defendants have set up a dangerous vibration on their own land and allowed it to escape on to our land. They are therefore in the position of insurers and liable for all damage occasioned by that escape: *Rylands* v. *Fletcher* (6); *National Telephone Co.* v. *Baker* (7); *Attorney-General* v. *Cory Bros.* (8) In such a case the condition of the plaintiffs' property, though relevant as to the quantum of damage, is irrelevant as to the question of liability. Vibration can clearly cause permanent structural damage: *Colwell* v. *St. Pancras Corporation.* (1)

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(1) 4 De G. & Sm. 315, 322.
(2) [1894] 2 Q. B. 836, 840, 841.
(3) 41 Ch. D. 88, 94, 96, 97.
(4) [1902] A. C. 381, 392, 393.
(5) [1905] 1 Ch. 480, 489.
(6) L. R. 3 H. L. 330, 338–340.
(7) [1893] 2 Ch. 186, 199.
(8) [1921] 1 A. C. 521, 539.

[ASTBURY J. Why were not the brown paper in *Robinson* v. *Kilvert* (2) and the recording apparatus in *Eastern and South African Telegraph Co.* v. *Cape Town Tramways* (3) treated as insured against the respective escapes of heat and electricity?]

The insurance is limited to physical injury to property. It does not apply to some special user of property, or to the disturbance of very delicate instruments.

Upjohn K.C. in rejoinder. A man who makes an unnatural use of his land by storing water or electricity or anything else of a hazardous nature thereon does it at his peril and is liable in trespass if it escapes on to his neighbour's land. That is the principle of *Rylands* v. *Fletcher.* (4)

But surely that principle does not apply to vibration caused by temporary building operations. That is a natural user of land. No doubt it may amount to a nuisance, and if the nuisance is such as would injuriously affect ordinary persons or property, the defendants may be liable for an actionable nuisance. But they cannot surely be liable in trespass, and the supposed analogy with *Rylands* v. *Fletcher* (4) breaks down in limine.

Cur. adv. vult.

Nov. 21. ASTBURY J. [after stating the facts and reading the evidence:] I am clearly of opinion on the evidence that the vibration produced by the defendants' operations caused serious structural damage and injury to the plaintiffs' building, and resulted in the order to pull down, and I so hold. It is suggested by the defendants without evidence that the plaintiffs' building might possibly have been saved in whole or in part if certain recommendations of the district surveyor in June, 1921,

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(1) [1904] 1 Ch. 707, 711.

(2) 41 Ch. D. 88, 94, 96, 97.

(3) [1902] A. C. 381, 392, 393.

(4) L. R. 3 H. L. 330, 338–340.

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had been carried out, which was not done. I express no opinion upon this suggestion at this stage of the case.

I now turn to the question of law which has been argued by the defendants. It is contended that the defendants' operations were lawful and not wrongful, and that they cannot be held liable for acts that they were entitled in the ordinary common course to do, by reason of the unstable character of the plaintiffs' building and its low resistance to external pressure. It is said that the law as to nuisance to human beings as stated by Knight Bruce V.-C. in *Walter* v. *Selfe* (1) is really applicable to buildings, and that one must not be too fastidious in trying to limit the actions of one's neighbours.

Four authorities, or rather suggested authorities, were referred to for this proposition. First, *Grosvenor Hotel Co.* v. *Hamilton.* (2) This was a case of landlord and tenant, but the following dicta were referred to. Lindley L.J. said (3): "The first question is whether the tenant has any right of action. It has been contended that the tenant's house was weak and insecure, and that the tenant is seeking to impose on his landlord a duty more extensive than that of an ordinary neighbour; for that to make vibration caused by a neighbour actionable it must be such as would damage a house of reasonable strength. If the case were not between lessor and lessee that might be so." Lopes L.J. said (4): "It is unnecessary to decide how the case would stand between strangers." The point in question was not argued or decided, and the principle enunciated in *Rylands* v. *Fletcher* (5) was not referred to or regarded as relevant.

The second case relied upon is *Robinson* v. *Kilvert.* (6) Cotton L.J. said (7): "But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life. Here it is shown that ordinary paper would not be damaged by what the defendants are doing, but only a particular kind of paper, and it is not shown that there is heat such as to incommode the workpeople on the plaintiff's premises." Lopes L.J. said (1): "A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade." This was strictly nuisance, the thing complained of was not in itself dangerous and did not interfere with the ordinary amenities of life, and was done in the ordinary use and enjoyment of property, and again *Rylands* v. *Fletcher* (2) was not cited as having anything to do with the case.

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(1) 4 De G. & Sm. 315, 322.

(2) [1894] 2 Q. B. 836.

(3) [1894] 2 Q. B. 839.

(4) [1894] 2 Q. B. 841.

(5) L. R. 3 H. L. 330, 338–340.

(6) 41 Ch. D. 88.

(7) 41 Ch. D. 94.

The third authority referred to is *Eastern and South African Telegraph Co.* v. *Cape Town Tramways* (3), where Lord Robertson said (4): "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure." But earlier in his judgment Lord Robertson said (5): "Now, if regard be had solely to the action of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Rylands* v. *Fletcher* (2) of the kind of things which a proprietor can only do at his own peril. Electricity (in the quantity which we are now dealing with) is capable when uncontrolled of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Rylands* v. *Fletcher* (1) and (2), the principle would apply. But this is only one-half of the question, and it remains to be seen if the injury postulated is present. Was there such resulting injury as to found a claim on the principle of *Rylands* v. *Fletcher?* (1) Now in the present case neither person nor property was injured (unless the ingenious suggestion of Mr. Bousfield could be entertained, that physical injury was done to the paper which was smudged by the eccentric action of the recording apparatus). Certainly there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary use of property." Here it is admitted that *Rylands* v. *Fletcher* (1) applies to all physical and tangible damage to person or property though not necessarily to some extraordinary and delicate user of property to which the insurer's liability in *Rylands* v. *Fletcher* (1) may not extend.

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(1) 41 Ch. D. 97.
(2) L. R. 3 H. L. 330, 338–340.
(3) [1902] A. C. 381.
(4) [1902] A. C. 393.
(5) [1902] A. C. 391.

The fourth and last case relied upon for this proposition is *Kine* v. *Jolly* (3), where Vaughan Williams L.J. said (4): "I think we must bear in mind that in these cases, which are conveniently grouped together as cases in which the proper form of action is an action of nuisance, citizens are not to be allowed to enforce rights which limit the user by others of property, unless the facts relied upon as constituting a nuisance are such as interfere with the ordinary rights which according to the ordinary notions of mankind they are entitled to exercise in relation to one another and in relation to their property." This is not contested; the passage is referring to nuisance properly so called, and the principle of *Rylands* v. *Fletcher* (1) was not within the discussion.

The following proposition is sought to be established from these passages: "A man cannot limit the operations of his neighbour on his own land or increase his neighbour's liability by putting his property for his own purposes into a structural condition in which it is more than ordinarily liable to be affected by that neighbour's legitimate operations." In some circumstances this may be accurate; as applied to the present case it is, in my judgment, inappropriate, and the analogy of contributory negligence does not apply.

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(1) L. R. 3 H. L. 330, 338–340.

(2) Sic.

(3) [1905] 1 Ch. 480.

(4) [1905] 1 Ch. 489.

The plaintiffs' further answers to these contentions are as follows: they say that a legal nuisance is something that a reasonable man ought not to be asked to put up with, and that there is an action on the case in the nature of trespass applicable here as instanced in *Rylands* v. *Fletcher* (1) when a man releases some force brought by him on to his own property which gets beyond his control and injures his neighbour, in which case he is in the position of an insurer and liable for the damage he may cause, and that in this case the condition of the property damaged is not a relevant consideration. As establishing these propositions *Rylands* v. *Fletcher* (1) was relied upon, especially certain passages in Lord Cairns' judgment. (2) *National Telephone Co.* v. *Baker* (3) was also relied upon for a passage in Kekewich J.'s judgment and *Attorney-General* v. *Cory Bros.* (4) was cited for Lord Finlay's remarks as to insurance. I do not think it is necessary at this stage to read these passages. In my judgment *Rylands* v. *Fletcher* (1) applies in this case, though I do not wish to be understood as indicating that the law as to legal nuisance may not also be applicable. I do not think that the plaintiffs' house was in November, 1920, the delicate and fastidious erection which has been suggested by the defendants. It is true that it was old, and, as compared with younger buildings whose constitution had been strengthened, reinforced or originally produced in accordance with the experience of modern building science, more or less infirm, but it was built in accordance with principles prevailing at the date of its original construction, and it was altered many years ago in accordance presumably with the Metropolitan Building Regulations then in operation, and as late as 1920 it had been made to comply with the then requirements of the

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(1) L. R. 3 H. L. 330, 338–340.

(2) L. R. 3 H. L. 338–340.

(3) [1893] 2 Ch. 186, 199.

(4) [1921] 1 A. C. 521, 539.

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appropriate district authority, and I see no justification for its being physically shaken in its declining years to a premature and untimely end by an adventurous and powerful neighbour even if the alleged analogy of *Walter* v. *Selfe* (1) were held to apply.

If the defendants' contentions of law were really apposite I should find it difficult to answer the query : " When does an old building lose its ordinary right of protection against destruction ? " The prospect of all old buildings in London and elsewhere having, if they are to be rendered immune and permitted to continue their existence, to be put into a condition capable of resisting not only all ordinary but also all extraordinary forces that may be let loose to operate against them, seems to me to be alarming.

For these reasons the plaintiffs are entitled to succeed. There will be a declaration that they have respectively suffered damage by reason of the defendants' operations complained of for which the latter are liable in law, and in respect of which they are liable in damages, and an inquiry directed to ascertain the amount of such damages. The defendants must pay the costs of the action up to and including this order.

Solicitors : *Sandilands & Co. ; Herbert Reeves & Co.*

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(1) 4 De G. & Sm. 315, 322.

G. R. A.

In re BARLEY.

ASTBURY J.

1922

Dec. 11.

[441 of 1921.]

Bankruptcy—Rejection of Proof—Appeal—Time—Twenty-one Days—Non-effective Application—Notice of Motion unsupported by Affidavit—Extension of Time—Bankruptcy Rules, 1915, *rr.* 26, 27, 28, 262.

The effect of r. 262 read with rr. 26, 27, 28 of the Bankruptcy Rules, 1915, is that subject to the Court's power to extend the time, which will only be exercised in very special circumstances, no application to reverse or vary the trustee's decision in rejecting a proof can be entertained unless it is made by notice of motion supported by affidavit and set down within 21 days of the decision, so that there is an effective application before the Court within that period.

In re Taylor [1909] 1 K.B. 103; *In re Dallmeyer* (1906) [1909] 1 K. B. 105n.; and *In re Vitoria* [1894] 1 Q. B. 259, 263 applied.

Motion.

The above-named debtor was adjudicated a bankrupt on July 5, 1921. On August 17, 1922, the applicant lodged a proof for 121,298*l*. On September 14, 1922, the trustee finally rejected this proof.

On October 4, 1922, the applicant served a notice of motion stating that the Court would be moved on the expiration of fourteen days after service or so soon thereafter as counsel could be heard for an order that the trustee's decision rejecting the proof be reversed or varied and that the trustee be directed to admit the proof.

No affidavits were served with this notice of motion, but it was accompanied by a letter from the applicant's solicitors stating that: "The affidavits which we intend filing in support of the motion are not yet ready but we trust to be in a position to supply you with copies in the course of the next few days."

On October 5 the Registrar was asked to set down the motion and appoint a day for the hearing, but declined to do so in default of an affidavit. No affidavit was sworn until October 30, and as this was not quite accurate, it was corrected and resworn on November 10. On November 13 the Registrar appointed Monday, November 27, for the hearing, and the motion was set down on November 14, but the case did not

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come on till Monday, December 11, the first motion day after November 13.

The trustee took the preliminary objection that the motion was out of time under r. 262 of the Bankruptcy Rules, 1915.

Clayton K.C. and *Oscar Kean* for the trustee. The Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), Sch. II., r. 25, provides that if a creditor is dissatisfied with the trustee's decision in respect of a proof, the Court may, on the creditor's application, reverse or vary the decision.

These applications are regulated by the 1915 rules. Rule 26 provides that every application shall be made by "motion supported by affidavit." Rule 27 provides that where any party, other than the applicant, is affected by the motion, no order shall be made, unless upon the consent of such party, or upon proof that "notice of the intended motion and a copy of the affidavits in support thereof" have been duly served upon such party. Rule 28 provides that notice of motion shall be served on any party to be affected thereby "not less than 8 days" before the day named in the notice for hearing the motion. Rule 29 provides that a respondent intending to use affidavits in opposition must deliver copies to the applicant not less than two days before the day appointed for the hearing. Rule 262 provides that, subject to the power of the Court to extend the time, no application to reverse or vary the trustee's decision in rejecting a proof "shall be entertained after the expiration of 21 days from the date of the decision complained of."

The Office Practice is settled by the regulations of March 25, 1885, printed in Williams on Bankruptcy, 12th ed., p. 696. The motions must be set down in the Registrar's list under reg. 3, and under reg. 6 the notice of motion must name some Monday for hearing.

The proper procedure therefore is to give not less than eight days' notice of motion for a day to be ascertained from the Registrar, lodge it and the affidavits with the Registrar and get it set down within the twenty-one days. The actual hearing may of course be later, but unless an effective application by notice of motion and affidavits is set down within the twenty-one days it cannot be entertained at all.

In the present case the notice of motion not only was not served until October 4, the twentieth day, but it was unaccompanied by affidavits. It could not be set down until after November 10 when the affidavit was sworn. This delay was solely due to the applicant and there is no ground for extending the time.

Sir Albion Richardson for the applicant. There has been no irregularity. The notice of motion was duly served within the twenty-one days. It is no doubt usual to serve copy affidavits at the same time, but there is no rule making this a sine qua non. It is really sufficient if they are served a few days before the hearing so as to give the respondent time to file affidavits in opposition under r. 29. The day fixed by the Registrar for the hearing is undoubtedly outside the twenty-one days, but the application referred to in r. 262 is clearly the notice of motion, which was in due time. If I am technically wrong I ask the Court to extend the time.

Clayton K.C. in reply. I am not aware of any direct authority on the meaning of "no application . . . . shall be entertained" in r. 262, though Cave J.'s remarks in *In re Deerhurst* (1) are somewhat in point. But there are decisions on the analogous words "no appeal . . . . shall be brought after the expiration of 21 days" in r. 130. In *In re Dallmeyer* (2) Romer L.J. said that merely serving notice of appeal was not "bringing" an appeal, and the Court of Appeal held that the deposit must be paid and the appeal set down within the twenty-one days. This was applied in *In re Taylor.* (3) The rules as to appeals must be strictly complied with and the Court can only extend the time in special circumstances: *In re Vitoria.* (4)

There are no special circumstances here, and the motion should strictly be dismissed with costs on the preliminary objection. If however I am given my costs in any event I should not object to the case being heard on the merits.

(1) (1891) 8 Morrell, 258, 263.
(2) [1909] 1 K. B. 105n.
(3) [1909] 1 K. B. 103.
(4) [1894] 1 Q. B. 259, 263.

Sir Albion Richardson. If the Court is against me on the preliminary objection I assent to that course being taken.

ASTBURY J. [after stating the facts and reading rr. 26, 27 28 and 262:] The question turns on the meaning of the provision in r. 262 as to applications of this nature. It provides that: " No application . . . . shall be entertained after the expiration of 21 days." In the present case that period expired on October 5. It is true that the notice of motion was served on October 4. But not being accompanied by any affidavit, no time could be fixed for the hearing nor could the motion be set down and the twenty-one days expired with no valid, effective, or available notice of motion before the Court.

In *In re Taylor* (1) an analogous case under r. 130 where the notice of appeal was served within the twenty-one days, but the deposit was not paid, nor was the appeal set down within the twenty-one days, Bigham J. held that the appeal was out of time. He relied on *In re Dallmeyer* (2), where the Court of Appeal took a similar view and held that an appeal was not " brought " within r. 130 by merely serving notice of appeal.

In my opinion the preliminary objection succeeds, and the applicant has shown no ground for an extension of time. In coming to this conclusion I am particularly assisted by the judgment of Lord Halsbury in *In re Vitoria.* (3) He said: " When I find a statutory direction . . . . that ' no appeal shall be entertained except in conformity with such general rules as may for the time being be in force . . . . ' ; and when I am called upon to exercise the discretion given to the Court by s. 105 by enlarging the period within which under the general rules notice of the appeal is to be sent to the Registrar of the Court appealed from, it is impossible not to see that the Legislature for some good reason has not left the matter absolutely to the discretion of the Court, but has given a rule to guide them in exercising that discretion. It would have been easy for the Legislature to have said that, where no injustice resulted from non-compliance with the rules as to appeals, compliance with them might be dispensed with. It has not done so in any way. It has thought right to give a criterion to guide the Court in the exercise of the discretion —which I admit exists—by saying that the appeal shall only be entertained if the rules are complied with."

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(1) [1909] 1 K. B. 103.

(2) [1909] 1 K. B. 105n.

(3) [1894] 1 Q. B. 259, 263.

After referring to *Ex parte Lamb* (1), where the Court of Appeal held that the use of the word "forthwith" in r. 144 of 1870 conclusively showed that the act should be done without unnecessary delay, Lord Halsbury continued: "Here the notice required . . . . by r. 132 . . . . has not been sent at all. The only excuse given is that the non-compliance with the plain direction of the rule resulted from a slip or from forgetfulness. If we were to hold that such compliance might be dispensed with, the marginal note of the case would be: The slip or the forgetfulness of a solicitor constitutes such special circumstances as will justify the Court in dispensing with compliance with the direction contained in r. 132. I think it would be wrong to hold that the dispensing power should be exercised when all that the litigant can say is, 'My solicitor made a blunder and forgot to give the notice.'"

For these reasons I am of opinion that the twenty-one days limited by r. 262 lapsed before there was any effective notice of motion or application before the Court. The preliminary objection succeeds and the trustee is strictly entitled to have the motion dismissed with costs. He is however willing to have the motion heard on the merits, if he is given his costs in any event. I will treat his consent as special circumstances and extend the time accordingly, merely ordering payment of his costs.

[The motion was then heard on the merits and dismissed with costs without prejudice to the applicant's right to lodge a fresh proof in respect of two items of his claim.]

Solicitors: *Markby, Stewart & Wadeson; Isadore Goldman & Son.*

G. R. A.

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(1) (1881) 19 Ch. D. 169.

EVE J.
1922
Dec. 13.

In re HARDING.

HARDING v. PATERSON.

[1922. H. 1376.]

Will—Construction—Power of Appointment—Power given to Persons Nominatim and not in Virtue of an Office—Whether determined on Death of One of Donees—Trustee Act, 1893 (56 *&* 57 *Vict. c.* 53), *ss.* 22, 50.

The rule that a bare power, given to two or more persons by name and not annexed to an estate or office, does not survive without more is not abrogated by s. 22 of the Trustee Act, 1893, which provides that where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

By his will, dated March 23, 1899, the testator appointed the plaintiffs and two other persons, since deceased, to be the executors and trustees thereof, and by a codicil, dated April 13, 1900, he requested that his wife should be added to the list of his executors. By clause 30 of his will the testator declared that the power of appointing new trustees should be vested in his wife during her life, and after her death in his "said five daughters" (previously mentioned nominatim), or, if they could not agree, in the majority of them, provided always that in case any of his daughters should die leaving a child or children her surviving, the eldest child for the time being (if of the age of twenty-one years) of such daughter so dying should stand in the place of his or her mother, and have and be entitled to exercise the right of joining in the appointment of a new trustee or new trustees.

The testator died on May 22, 1900, leaving his wife and five daughters him surviving. His widow died in 1911. On October 28, 1921, one of the testator's daughters died without ever having had any child.

The plaintiffs took out this summons asking (inter alia) for the determination of the question whether, upon the true construction of the will and in the events which had happened, the power of appointing new trustees was exercisable by the testator's four surviving daughters or a majority of them.

Beebee for the plaintiffs.

Nicholson Combe for two of the testator's daughters. There is great diversity of opinion amongst text writers as to whether the exercise of a power of appointment survives in the case of a bare power.

The power of appointing new trustees under clause 30 of the will survives on the death of one of the five daughters to the other four daughters. By s. 22 of the Trustee Act, 1893, where a power is given to or vested in two or more trustees, then, unless a contrary intention is expressed in the instrument, the same may be exercised by the survivors of them. By s. 50 "trustee" includes implied and constructive trusts. The five daughters of the testator were either implied or constructive trustees, because a bare power to appoint new trustees is a fiduciary power: *In re Skeats' Settlement.* (1) In *In re Shortridge* (2) it was held by the Court of Appeal that a bare power to appoint new trustees was "a power vested in a lunatic, in the character of trustee" within the meaning of s. 128 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5).

Sect. 22 of the Trustee Act, 1893, is a re-enactment of s. 38 of the Conveyancing Act, 1881. That section in effect abrogated the old rule of construction that a bare power given to two or more nominatim, and not attached to an office, will not survive without express words. Lord St. Leonards in Sugden on Powers, 8th ed., p. 128, laid down that rule as the first of four rules on the survivorship of powers. The second rule that where such a power is given to three or more generally, as to "my sons," and not by their proper names, the power will survive while the plural number remains, is also material. In Vaizey on Settlements, vol. i., p. 348, the view is expressed that s. 38 of the Conveyancing Act, 1881, abrogated the first rule of Lord St. Leonards. I submit that is the correct view. The opposite view is expressed in Hood and Challis, 7th ed., p. 407 (note to s. 22 of the Trustee Act, 1893). In Farwell on Powers, 3rd ed., pp. 514 et seq., the first two rules of Lord St. Leonards are laid down, some doubt being thrown on the second. Divergency in the views of Vaizey and Hood and Challis is pointed out, and apparently the view of the latter is preferred. But the view expressed by Vaizey has since been justified by *In re Skeat's Settlement* (1) and *In re Shortridge* (2), and by s. 50 of the Trustee Act, 1893.

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(1) (1889) 42 Ch. D. 522, 526, 527. (2) [1895] 1 Ch. 278.

I submit the four daughters can execute the power by reason of the statutory survivorship, there being nothing here to show a contrary intention. If I am wrong and s. 22 does not apply, so that Lord St. Leonards' rules are not abrogated, then I say his second rule applies. Here "my said five daughters" is, in effect, a description of a class, and is not the naming of the donees nominatim. If I am also wrong in this, then I say there is sufficient in the proviso to clause 30 of the will to take the case out of the first rule. The testator clearly contemplates that the power shall be exercised after the death of one of the five daughters.

Gilbart-Smith, *Vernon* and *A. Adams* for other parties.

EVE J. I do not think the old rule that a bare power, given to two or more persons by name and not annexed to an estate or office, does not survive, has been abrogated by s. 22 of the Trustee Act, 1893 (formerly s. 38 of the Conveyancing Act, 1881). I arrive at that conclusion on the introductory words of the section: "Where a power or trust is given to or vested in two or more trustees," words which must, I think, be construed strictly. The section does not read: "Where a power or trust is given to or vested in two or more persons," but that would be the meaning if Mr. Combe's argument were well founded.

That opinion does not, however, determine this case. In this will there is, I think, sufficient context to show that the testator contemplated and intended the power to be exercisable by the survivors or survivor of the five daughters.

(1) 42 Ch. D. 522.

(2) [1895] 1 Ch. 278.

One cannot read the proviso in clause 30 and believe that the testator intended the power to determine in the event of the death of one of his five daughters. He obviously considers that it will survive, and provides for the keeping up of the numerical strength of the donees of the power by directing that if the dead daughter leaves an eldest child of full age, such child is to be added to the body of persons to whom the exercise of the power is committed. It would, in my opinion, be a strained construction of the clause to hold that the power was suspended on the death of any one of the daughters, and was revived if and when a child of the deceased daughter was of full age and competent to take the parent's place. The clause must be read as a whole, with the result that the power survives and can be exercised by a majority of the persons for the time being constituting the body in whom it is vested.

Solicitors: *Calder Woods & Pethick, for Wansbroughs, Robinson, Tayler & Taylor, Bristol; W. H. Pitman, for James Sinnott & Son, Bristol; Shield & Mackarness, for Shield & Mackarness, Petersfield.*

P. J. B.

SARGANT J.

1922

Dec. 14.

EARL OF POWIS *v.* NEGUS.

[1919. P. 1129.]

Practice—Discovery—Subpœna duces tecum—Forfeiture.

A lessor brought an action against lessees (trustees for the P. Company) for forfeiture of their lease on the ground (inter alia) that they had in breach of a covenant contained in the lease assigned or parted with possession to two other companies without the licence of the lessor. The two companies were also made defendants, the relief claimed against them being possession of the demised premises. These defendants by their defence denied that the lessees had assigned or parted with possession of any part of the demised premises to them or that they were in possession of any part of the premises. The plaintiff served a subpœna duces tecum on the secretary of both companies requiring him to produce specified books of the companies:—

Held that, while the Court would not grant discovery by way of a subpœna duces tecum against the secretary of a company in aid of a claim for forfeiture of that company's lease, this subpœna was valid and effective, because the two defendant companies did not claim to be in possession by virtue of any derivative title under the lease, so that the action against them was not for forfeiture.

By an indenture of lease dated July 15, 1913, the plaintiff demised to the defendants William Negus, Edward Donald Nicholson, and William Martin Ewings Negus (hereafter called the lessees) certain lands, rocks, and quarries of limestone in the county of Montgomery and the stables, offices, kilns and buildings on the said lands as to part for the term of twenty-one years and as to the remainder for the term of sixty years at the rents, royalties, and sums of money therein mentioned. The lessees entered into various covenants, including in particular a covenant that they would not at any time during the continuance of the demise "sell, let, assign, or dispose of the said works and premises hereby demised or otherwise part with the possession thereof or of any part thereof or of any of the privileges hereby granted for all or any part of the said respective terms without the licence and consent in writing of the lessor first had and obtained and which consent shall not be unreasonably withheld."

It was alleged by the plaintiff that in excess of the liberties granted by the lease the lessees and persons authorized by them had done specified wrongful acts; and also that the lessees had broken the covenants and provisions of the lease. And by para. 4 (*e*) of the statement of claim the plaintiff alleged in particular against the lessees that "without any consent given by or even asked of the plaintiff they have assigned to or permitted the respective defendants, the Porthywaen Lime Company, Ld., and the Whitehaven Basic Company, Ld., and the Welshpool Granitar Roads, Ld., to enter into possession of respective parts of the demised premises, and to exercise liberties granted by the lease, and the lastly-mentioned defendants respectively are now in possession of such respective parts and are exercising such liberties."

The plaintiff claimed as against all the defendants recovery of possession of the demised premises; and as against the lessees damages for breaches of covenants, and for wrongful injuries to the demised premises.

At the hearing it was admitted that the lessees took the lease as trustees for the Porthywaen Lime Company, Ld., and any claim for forfeiture for parting with possession to that company was abandoned.

By their defence the lessees denied the alleged injuries to the premises and breaches of covenant. By their defences the Whitehaven Basic Company, Ld., and Welshpool Granitar Roads, Ld., denied that the lessees or any of them had assigned to or permitted them to enter into possession of any part of the demised premises or to exercise any liberties granted by the lease, or that they had ever been in possession of any part of the said premises or exercised the said liberties.

In the course of the trial a subpœna duces tecum was served on the secretary to the three defendant companies for the production of all the books of the companies, which were not specified, over a certain period. Later a second subpœna duces tecum was served upon him as secretary only of the Whitehaven Basic Company, Ld., and the Welshpool Granitar Roads, Ld., requiring him to produce specified books of the two companies for certain years.

Judgment in the action was delivered on January 22

1923, but the case calls for report only on the question, argued on December 14, 1922, whether the secretary could be required to produce these books.

Upjohn K.C., *Galbraith K.C.*, *Greene K.C.*, *R. E. Negus* and *P. C. O. Riddell* for the defendants. A subpœna duces tecum must specify the documents to be produced and must not be too vague or general in its terms: *Attorney-General* v. *Wilson* (1); *Lee* v. *Angas*. (2) The first subpœna is therefore clearly invalid as being too vague, as it specifies no particular books; and the second demands practically all the companies' books for a number of years and is also too general in its terms.

But, apart from any such question, the subpœnas are attempts to get in the first case the three defendant companies and in the second the last two defendant companies to produce books in an action for forfeiture and the Court ought not to and will not assist the plaintiff. In effect it is an attempt to obtain discovery and this Court always refuses discovery in aid of an action for forfeiture: Phipson on Evidence, 6th ed., p. 200; *Greenough* v. *Gaskell* (3); Taylor on Evidence, 11th ed., p. 997; *Pye* v. *Butterfield* (4); *Martin* v. *Treacher* (5); *Earl of Mexborough* v. *Whitwood Urban Council*. (6) It was a principle of the Crown law that when a common informer sued for a penalty, the Court would not assist him in any way, and this principle was applied to actions for forfeiture. This principle applies not only to interlocutory proceedings but also at the hearing of the action. It was a principle founded on the view that a man must not be asked to incriminate himself. The Court will not at any stage of proceedings make a defendant admit an act making him liable to forfeiture or a penalty. The position is exactly as if a witness were called by the plaintiff and asked to admit a forfeiture. In such a case the Court would not compel the witness to answer: compare *Rex* v. *Friend*. (7)

(1) (1839) 9 Sim. 526.
(2) (1866) L. R. 2 Eq. 59, 63.
(3) (1833) 1 Myl. & K. 98, 115.
(4) (1864) 5 B. & S. 829, 836.
(5) (1886) 16 Q. B. D. 507.
(6) [1897] 2 Q. B. 111, 117, 121.
(7) (1696) 13 How. St. Tr. 1.

A. Grant K.C., *Maugham K.C.* and *MacSwinney* for the plaintiff. The first subpœna is not insisted on but the second subpœna cannot be objected to as being too vague. The secretary of the two companies being here, he could be asked what documents he had with him and be called upon to produce them: *Lee* v. *Angas*. (1)

The main objection to the subpœna is based on a misconception; the action as against the lessees is for forfeiture but as against the two companies for ejectment only. Their defences were that they had never been let into possession by the lessees. That being so, they can only be in possession, if at all, as trespassers, and there is no rule that the Court will not assist a plaintiff in an action for trespass by giving discovery. There was no claim by these defendants that they were entitled to possession under the lease.

Upjohn K.C. in reply. This argument is fallacious. The action as against all the defendants is for forfeiture. Para. 4 (*e*) of the statement of claim alleges an assignment or parting with possession to these two companies in breach of the covenant in the lease and that they are in possession. That amounts to an allegation that these defendants have a paper title derived from the lessees; and possession is claimed on the ground that the title of the lessees cannot stand against the plaintiff who is entitled to re-enter for breach of covenant. The forfeiture is not limited to the lessees but extends to every derivative estate. Further the question concerns all the defendants and cannot be dealt with as though the companies whose documents are being called for were outsiders. It is the privilege of all that is being asserted.

SARGANT J. I have to deal with the question whether a subpœna duces tecum served upon Mr. Morrish, the secretary of three companies, who are some of the defendants to this action, is a good subpœna in the sense that he ought to be ordered to produce the documents which are named in it. Originally there was a subpœna served upon him as the secretary of all three of these defendant companies. They

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(1) L. R. 2 Eq. 59, 64.

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are companies of which the management is to a large extent the same, and the documents in question were described in a very general manner. Mr. Upjohn took exception for the defendants to that application, both on the ground of the too great generality of the description, and also on the very important general ground that discovery of this sort would not be ordered in aid of a forfeiture. That subpœna I have no longer to deal with, because a second subpœna has been served in which Mr. Morrish is described not as the secretary of all three defendant companies, but as the secretary of two of the defendant companies—namely, the Whitehaven Basic Company, Ld., and the Welshpool Granitar Roads, Ld. In this subpœna the documents which it is desired to have produced are also described in a much more definite manner than they were described in the first subpœna, and it is not open to objection on the ground of too great generality.

The question is whether the general objection to the production of the documents on the ground that it is in aid of an action for forfeiture is sustainable on the terms of this particular subpœna.

Mr. Upjohn, in his very interesting argument, has completely convinced me that if this subpœna duces tecum had been served on a person who was a secretary of a company with the object of enforcing the forfeiture of a lease against that company, the subpœna would be bad. He has convinced me that the practice is the same at Common Law and in Chancery in these matters, and I think that, as was stated by Chitty L.J. in *Earl of Mexborough* v. *Whitwood Urban Council* (1), the refusal in Chancery to order on interlocutory proceedings discovery of documents in cases, amongst others, involving forfeiture, is a reflex of the earlier Common Law rule that such documents ought not to be ordered to be produced by the person against whom the forfeiture was sought to be enforced.

Accordingly, to that extent I agree entirely with the argument of Mr. Upjohn, which indeed was not, as I understand it, in any way controverted by Mr. Grant. Mr. Grant's

(1) [1897] 2 Q. B. 111, 121.

contention is a completely different one. He argues that the objection taken by Mr. Upjohn is not effective, because as against these two companies, the Whitehaven Basic Company, Ld., and the Welshpool Granitar Roads, Ld., no forfeiture at all is sought to be enforced in these proceedings. The matter stands on the pleadings in this way: the first three defendants are the persons to whom the lease of 1913 was granted, and this lease contains a covenant against assignment, underletting or parting with the possession of the demised premises; and it is alleged that without any consent such as was required by the terms of the covenant, the lessees "have assigned to or permitted . . . . the Whitehaven Basic Company, Limited, and the Welshpool Granitar Roads, Limited, to enter into possession of respective parts of the demised premises, and to exercise liabilities granted by the lease, and the lastly mentioned defendants respectively are now in possession of such respective parts and are exercising such liabilities." The defence of the Whitehaven Basic Company, Ld., and the Welshpool Granitar Roads, Ld., of which companies the person served with the subpoena is described as being secretary, is this: "These defendants deny that the defendants or any of them have assigned to or permitted these defendants to enter into possession of any part of the demised premises or to exercise any liberties granted by the lease," and they deny further "that these defendants are or ever have been in possession of any part of the said premises or are exercising or ever have exercised any of the said liberties." Thus they expressly deny that they derive title under and by virtue of any assignment, underletting or parting with possession by the lessees under the lease.

It seems to me that in those circumstances the action as against them is not one for forfeiture at all. The two companies appear to me to be in a complete dilemma. If they were to allow that there had been an assignment, underletting or parting with possession to them, then they would show that the lessees had made themselves liable to a forfeiture, and therefore that they could not possibly have any title whatever as against the plaintiff under the lease. Their

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defence therefore is not founded upon their being in possession by virtue of the lease, or by virtue of any derivative title under it. It appears to me to be a mere denial of the allegation that they are in possession, and, in my judgment, as against these persons the action is not one of forfeiture. The plaintiff is not seeking to deprive them of anything that they could have taken under the lease, and although the action is undoubtedly one of forfeiture as against the lessees the Porthywaen Co., it is not, in my judgment, an action of forfeiture against these two companies. Therefore, the subpœna is good and the witness is bound to produce the documents.

Solicitors for the plaintiff: *Patersons, Snow & Co., for Salt & Son, Shrewsbury.*

Solicitor for defendants: *William Negus.*

H. C. G.

RUSSELL J.
1922
Nov. 15, 16; *Dec.* 4.

In re BERCHTOLD.

BERCHTOLD *v.* CAPRON.

[1913. B. 2773.]

Conflict of Laws—Land devised on Trust for Sale—Movables or Immovables—Devolution—Lex situs—Lex domicilii.

When a person domiciled in a foreign country dies intestate leaving an interest in the proceeds of sale of English freeholds which are subject to a trust for sale but not yet sold, such an interest is an immovable, and the succession thereto is governed by the lex situs.

ORIGINATING SUMMONS.

On April 2, 1906, Count Richard Berchtold died, being a person of Hungarian nationality and domicil. He left a will (dated March 2, 1901) in English form dealing with his estate in England. By that will he devised and bequeathed all his freehold estate in Birmingham and all other his real estate and all his personal estate in the United Kingdom (subject to the payment of his testamentary expenses and debts in the United Kingdom) to his trustees, Frederick William Capron and William Frederick Brabant, of London, upon trust for sale and conversion. In the events which happened the trusts of the proceeds and of the investments for the time being representing the same were as follows: In trust during the life of his wife (who died in 1913) to pay out of the income thereof the yearly sum of 500*l.* to his wife, and to stand possessed of the residue of the said income in trust for his son Count Nicholas, and, after the decease of his wife to stand possessed of the capital and the income thereof in trust for his said son. The will contained a power to postpone sale and conversion for so long as the trustees should think fit, and a declaration that the rents, profits, and income of such part of his estate as should for the time being remain unsold and unconverted should be paid to the persons to whom the income of the proceeds of such sale and conversion would for the time being be payable under the will if such sale and conversion had been actually made. Power was given to the trustees to let or demise any property remaining unsold; and the testator declared his wish to be that the property at Birmingham should not be sold before the year 1920, but stated that he did not intend by the expression of such wish to create any binding trust or to prevent the free exercise by his trustees of their discretion.

Apart from a small sum of money, which may be disregarded, the testator's English estate consisted wholly of the freehold estate at Birmingham, which was subject to a mortgage in favour of an insurance company to receive a principal sum of about 43,000*l.* Count Richard left him surviving his wife, his only son Count Nicholas, and an only daughter Countess Szokolyi, who is a defendant to these proceedings.

From the death of Count Richard during the remainder of the life of Count Nicholas, the Birmingham freeholds remained unsold. The balance of the rents remaining after payment of the mortgage interest was remitted from time to time to Hungary. Count Nicholas died on July 9, 1911, intestate. He was of Hungarian nationality and domicil. He left him surviving his widow the plaintiff and one child only, Count Antoine, who was then an infant aged sixteen, having been born on April 25, 1895. On February 24, 1913, letters of administration to the estate of Count Nicholas were granted by the Principal Probate Registry to the defendant David Maun Linley as attorney for the plaintiff. The estate of Count Nicholas in this country consisted of his beneficial interest in the Birmingham freeholds, and the proceeds of sale thereof, under the will of Count Richard, and a sum of some 760*l.*, being rents from that property. The sum of 760*l.* was exhausted in payment of estate duty, the balance required for the payment of estate duty being raised by means of a further mortgage of the Birmingham freeholds. On August 1, 1913, the present summons was issued raising a number of questions. On February 19, 1914, Eve J. made an order disposing of many of the questions raised. By that order the trustees of Count Richard's will were ordered to retain unsold the Birmingham freeholds during the minority of Count Antoine (who was a defendant to the summons), or until further order, but without prejudice to any question as between the plaintiff and the infant defendant, and, during such period of retention, to pay the whole of the net rents and profits and accumulations to the plaintiff, she thereout suitably maintaining the said infant. Question 2 of the summons was ordered to stand over. It was as follows: "Whether the persons or person beneficially entitled to the proceeds of sale of the said real estate (if sold) and to the rents and profits thereof (until sale) are the persons or person who would be entitled according to English law or the persons or person who would be entitled according to the law of Hungary." In pursuance of that order the surplus income of the Birmingham freeholds was paid to the plaintiff down to the outbreak of war in August, 1914, since when the surplus income had been held up. Count Antoine was killed in action on October 23, 1915, under the age of twenty-one years. He was of Hungarian nationality and domicil. He left a will (dated April 12, 1914) which has been declared by the

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Hungarian Courts to be invalid. He accordingly died intestate, leaving his mother, the plaintiff, his sole next of kin. In pursuance of an order dated July 19, 1920, and made in this action, a small portion of the Birmingham freeholds was sold, and the net proceeds were applied in reduction of the mortgage. Except for this sale, no part of the Birmingham freeholds devised upon trust for sale by the will of Count Richard has ever been sold. They are still unsold and remain subject to the mortgage upon which principal moneys amounting to 42,846*l.* are due. On January 19, 1921, letters of administration to the estate within the United Kingdom of Count Antoine were granted by the Principal Probate Registry to the Public Trustee. The summons of August 1, 1913, was amended, (1.) by entitling it In the Matter of the Estate of Count Antoine and asking for administration of that estate so far as might be necessary, and, (2.) by adding as defendants the Public Trustee and Countess Szokolyi. Question 2 now comes for decision.

MacSwinney for the trustees.

Gover K.C. and *Errington* for the plaintiff. The question is whether the interests taken in the Birmingham freeholds by Counts Nicholas and Antoine under the will of the testator were immovable property or movable property according to the laws of England. The devolution of immovables is governed by the lex situs and that of movables by the lex domicilii: Dicey on Conflict of Laws, 3rd ed., rr. 150, 151.

It is submitted that when land is devised on trust for sale the proceeds of the sale are regarded as immovable. Immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests: *In re Hoyles.* (1)

When a person of foreign domicil dies intestate leaving English realty which has been converted into personalty the succession thereto is governed by the lex situs: Dicey on Conflict of Laws, 1st ed., p. 520, Note 2; Westlake on Private International Law, 3rd ed., p. 189, r. 158. Where a testator, of Irish domicil, left a leasehold house in England to trustees, upon trust for sale, it was held that the leasehold was an immovable governed by the lex situs, and that the proceeds of its sale followed the law applicable to the leasehold itself: *Freke* v. *Lord Carbery* (1); see, too, *Duncan* v. *Lawson*. (2) A rent charge on land in England is deemed to be of the nature of the land itself—namely, immovable: *Chatfield* v. *Berchtold*. (3) So, too, are Scotch heritable bonds; *In re Fitzgerald* (4); and mortgage debts secured by land: *In re Hoyles*. (5)

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(1) [1911] 1 Ch. 179, 183.

Murray v. *Champernowne* (6), though not binding on this Court as it was a decision of an Irish Court, is a direct decision in my favour. In that case land was vested in trustees upon trust for sale, the trusts of the proceeds being for such persons as M. should by his will appoint. M. exercised the power in favour of his wife. Thirty-one years later, the lands being still unsold, as in this case, on an application to revoke probate of M.'s will, it was necessary to decide whether the property subject to the power was movable or immovable property, and the Court held that the property subject to the power was immovable.

Under various statutes an interest in the proceeds of land subject to a trust for sale has been held to be " an interest in land," or " a sum of money payable out of land " : see *Briggs* v. *Chamberlain* (7) and *Miller* v. *Collins* (8) under the Act for the Abolition of Fines and Recoveries, 1833, s. 77; *Brook* v. *Badley* (9) under the Mortmain Act, 1736, s. 3; *Bowyer* v. *Woodman* (10) and *In re Fox* (11) under the Real Property Limitation Act, 1833, s. 42; and *In re Thomas* (12) under the Dower Act, 1833, s. 9.

These illustrations under particular Acts show that although for purposes of devolution the law may recognize an interest in property such as is in question here as a movable, yet

(1) (1873) L. R. 16 Eq. 461.
(2) (1889) 41 Ch. D. 394.
(3) (1872) L. R. 7 Ch. 192.
(4) [1904] 1 Ch. 573.
(5) [1911] 1 Ch. 179.
(6) [1901] 2 I. R. 232.
(7) (1853) 11 Hare, 69.
(8) [1896] 1 Ch. 573.
(9) (1868) L. R. 3 Ch. 672.
(10) (1867) L. R. 3 Eq. 313.
(11) [1913] 2 Ch. 75.
(12) (1886) 34 Ch. D. 166.

for general purposes it is in the nature of an immovable. In some tax cases the opposite view was taken. But although land notionally converted into money may be subject to tax as personalty it is no ground for saying that for purposes of international law it is not an immovable: see *Forbes* v. *Steven* (1); *In re Stokes* (2); *In re Piercy.* (3)

In these circumstances it is submitted that this is a case where the subject matter is an immovable governed by English law although English law treats that subject matter as personalty.

Gurdon for the administrators of the estates of Counts Nicholas and Antoine.

Clayton K.C. and *A. Adams* for the testator's daughter. In determining whether property is movable or immovable you do not consider its physical state but what it is in the eyes of the law. In the case of a conflict of laws on the death of an intestate his immovables devolve according to the lex situs, and his movables according to the lex domicilii. The lex situs decides whether the property is movable or immovable. The effect of a trust for conversion is that, equity deeming that to be done which ought to be done, land directed to be sold and turned into money is to be considered as money: *Fletcher* v. *Ashburner.* (4) The direction to convert has in the eye of the law made the land money. Money is a movable, and therefore such property devolves according to the law of the intestate's domicil: see Westlake's Private International Law, 6th ed., § 158, and *In re Piercy* (3); Hanson's Death Duties, 6th ed., pp. 799 and 800; *Attorney-General* v. *Brunning* (5); *Attorney-General* v. *Lomas* (6); *In re Gunn.* (7) Where land in England is held upon trust for sale the right of the person entitled to the proceeds is a right to sue the trustee in England and compel him to carry out the trust. That is a right against the trustee and not against the land. Such a right is a movable

(1) (1870) L. R. 10 Eq. 178.
(2) (1890) 62 L. T. 176.
(3) [1895] 1 Ch. 83.
(4) (1779) 1 Bro. C. C. 497.
(5) (1860) 8 H. L. C. 243.
(6) (1873) L. R. 9 Ex. 29.
(7) (1884) 9 P. D. 242.

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(Dicey's Conflict of Laws, 3rd ed., pp. 75, 76, 77), and is an equitable chose in action: *In re Smyth.* (1) There is no decision in these Courts to the contrary. Leaseholds in their nature are immovables which, according to English law, descend on intestacy according to the Statute of Distribution. In *Duncan* v. *Lawson* (2) and *Pepin* v. *Bruyère* (3) there was no trust for sale and therefore no right which was a movable. In *Freke* v. *Lord Carbery* (4) there was a trust for sale, but no question arose as to whether the next of kin entitled were entitled according to the law of England, or according to the law of the domicil.

As regards freeholds on trust for sale the only decision is that in *Murray* v. *Champernowne* (5), where the learned judge relied on the opinion of Mr. Dicey, expressed in the first edition of his Conflict of Laws but omitted in subsequent editions. That decision is not binding on this Court and the correctness of it is doubtful: Westlake's Private International Law, 6th ed., p. 209. In that case the beneficial interest was disposed of by the will and no question arose as to whether the heir at law or the next of kin took, nor, whether, if the next of kin took, they took according to the law of domicil or according to Irish law. A mortgage on freehold land differs essentially from a share of the proceeds of the sale of land held upon trust for sale. The mortgagee's debt is regarded as subordinate to his remedy and can only be enforced by recourse to the land. For some purposes such a mortgage is a movable: *Lawson* v. *Inland Revenue Commissioners* (6); for other purposes it is an immovable: *In re Hoyles.* (7) The cases cited on behalf of the plaintiff under the Dower, Mortmain, Fines and Recoveries, and Real Property Limitation Acts merely show that for certain purposes the proceeds of the sale of land held upon trust for sale are interests in land, and do not touch the question of whether they are movables or immovables. An interest in the proceeds of land devised on trust for sale is not an interest in land: *Du Hourmelin* v. *Sheldon.* (1)

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(1) [1898] 1 Ch. 89.

(2) 41 Ch. D. 394.

(3) [1902] 1 Ch. 24.

(4) L. R. 16 Eq. 461.

(5) [1901] 2 I. R. 232.

(6) [1896] W. N. 145.

(7) [1911] 1 Ch. 179.

In *Forbes* v. *Steven* (2) the question was whether duty was payable on the proceeds of sale of land in India which was partnership property. It was necessary to determine not only whether the proceeds were real or personal property but also, as the land was in India, whether the proceeds were an immovable, because then no duty would be payable, whereas if it were a movable it would be subject to the law of domicil and duty would be payable. The language of James V.-C. shows that conversion took place not only for the purpose of distribution but for all purposes, and that, as the interest of the testator in the property was an interest in the proceeds of the conversion, it was properly subject to duty in this country. That is, the interest was held to be a movable subject to English law.

In re Stokes (3) in terms decided that an interest in partnership land, or in land agreed to be sold, was a movable: see Hanson's Death Duties, 6th ed., p. 113. It is submitted that freehold land subject to an imperative trust for sale is money, and money is a movable which devolves, on the death of the owner, according to the law of his domicil, in this case Hungarian law.

Cur. adv. vult.

Dec. 4. RUSSELL J. It is conceded that when a conflict of laws arises on the death of an intestate, the devolution of his immovables is governed by the lex situs; the devolution of his movables is governed by the lex domicilii. It is further conceded that whether particular property is a movable or an immovable is decided according to the lex situs.

The questions which arise in the present case, arise in regard to (1.) the interest owned by Count Nicholas at his death in respect of the Birmingham freeholds which were subject to a trust for sale, and the other provisions contained in Count Richard's will; and (2.) the interest owned by

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(1) (1837) 1 Beav. 79.
(2) L. R. 10 Eq. 178.
(3) 62 L. T. 176.

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Count Antoine at his death in respect of the same freeholds. If these respective interests are immovable property according to the lex situs (i.e., the law of England) the law applicable to their devolution will be the law of England, and being, according to English law, personal estate, they will devolve upon the persons entitled by English law to the intestate's personal estate. The result of this solution would be that the plaintiff would take one-third on the intestacy of Count Nicholas as his widow, and the remaining two-thirds on the intestacy of Count Antoine as his mother and sole next of kin. On the other hand, if these respective interests are movable property according to the lex situs, the law applicable to their devolution will be the lex domicilii or law of Hungary. The result of this solution would be that, subject to a usufruct in favour of the plaintiff as the widow of Count Nicholas (as to the extent of which usufruct there is a question) the whole devolves upon and belongs to the Countess Szokolyi as the only sister of Count Nicholas, Count Antoine having died intestate and without leaving him surviving any issue, or any brother and sister, or any issue of a deceased brother or sister, or a father, or any brother of his deceased father. It will thus be seen that the primary question for decision can thus be framed. Were the interests taken by Count Nicholas and Count Antoine under or by virtue of the will of Count Richard, so far as regards the Birmingham freeholds thereby devised upon trust for sale, immovable property or movable property according to English law? The distinction between real estate and personal estate under English law has nothing to do with the question. The alternatives and the only alternatives for consideration are immovable property or movable property. It is said that there is no decision of the English Courts directly upon the point. There is a decision on the exact point in the Irish Courts, which though entitled to the highest respect, is not binding on me. I will first consider the matter apart from that decision. Different classes of property have come under the consideration of the Courts of this country and have been held to be immovables. Leaseholds are immovables;

Freke v. *Lord Carbery* (1), and *Duncan* v. *Lawson*. (2) A testatrix's share of a rentcharge issuing out of lands during the lives of herself and two others and the life of the longest liver was held to be an estate pur autre vie applicable by law as personal estate and chargeable with duty as personal estate under the Legacy Duty Act, 1796; and was held not to be exempt from duty by reason of the foreign domicil of the testatrix because the property was as much land as if land to the annual value of the rentcharge had been given, and was accordingly immovable property: *Chatfield* v. *Berchtoldt*. (3) Scotch heritable bonds are immovables: *In re Fitzgerald*. (4) A mortgage debt secured by land is immovable property: *In re Hoyles*. (5) Numerous authorities were cited for the purpose of showing that an interest in the proceeds of sale of real estate subject to a trust for sale was under different statutes treated as an interest in land. I will refer to a few. Such an interest of a married woman was held to be an interest in land which could pass by a fine, or by a deed having a like effect, under the Act for the Abolition of Fines and Recoveries: *Briggs* v. *Chamberlain*. (6) A sum, payable out of personalty and the proceeds of sale of real estate devised by a testator on trust for sale, was held incapable of being bequeathed by a testatrix for charitable purposes, the real estate not having been sold nor the sum raised. The sum was held to be an interest in land within s. 3 of the Mortmain Act, 1736: *Brook* v. *Badley*. (7) The share of a married woman in moneys arising from the proceeds of real estate devised upon trust for sale was held to be an interest in land and within the words of s. 42 of the Real Property Limitation Act, 1833: "Any sum of money charged upon or payable out of any land": *Bowyer* v. *Woodman*. (8) The gift to a widow of a life interest in part of the proceeds of sale of real and personal estate devised upon trust for sale was held to be a gift of an interest in land within s. 9 of the Dower Act, 1833: *In re Thomas.* (1) These authorities are only decisions that the property in question in each case fell within the wording of the relevant statute, but they certainly show that an interest in property such as I have to consider in the present case is aptly described as being "an interest in land," or "a sum of money payable out of land."

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(1) L. R. 16 Eq. 461.

(2) 41 Ch. D. 394.

(3) L. R. 7 Ch. 192.

(4) [1904] 1 Ch. 573.

(5) [1911] 1 Ch. 179.

(6) 11 Hare, 69.

(7) L. R. 3 Ch. 672.

(8) L. R. 3 Eq. 313.

Let me now consider what rights existed in Count Nicholas during his lifetime and at his death in regard to the Birmingham freeholds by virtue of the dispositions contained in the will of Count Richard. Subject to his mother's 500*l.* a year, he was absolutely entitled to the proceeds of sale if and when the sale took place. No sale in fact took place; the property continued to be land, immovable property. Subject to his mother's interest, Count Nicholas was entitled down to his death to the rents and profits of that immovable. It is arguable that under s. 63 of the Settled Land Act, 1882, he, or he and his mother together, would be deemed to be tenant for life of the Birmingham freeholds which would be deemed to be settled land, with the result that the land might have been sold by the tenant for life, or an order might have been made letting the tenant for life into possession: *In re Bagot's Settlement.* (2) Further, subject to the interest of the mother of Count Nicholas, the land was his in equity. As Lord Cairns said in *Brook* v. *Badley* (3), the land was in the hands of the trustees not for the benefit of those trustees but for the benefit of those to whom the proceeds of sale of the land were to be paid when the sale took place; the interest was an interest in land, and it would be right to say in equity that the land did not belong to the trustees but to those to whom the proceeds of sale were to be paid. Equally applicable to Count Nicholas is the language used by Cotton L.J. in *Ashworth* v. *Munn* (4), when, referring to *Brook* v. *Badley* (3), he says: "Although what the testator could get is money only, and although he leaves an interest which he can only get in the shape of money, still it is an

(1) 34 Ch. D. 166.

(2) [1894] 1 Ch. 177.

(3) L. R. 3 Ch. 672.

(4) (1880) 15 Ch. D. 363, 374.

interest in land, if at the time of his death what he devises is in the shape, not of money realized, but of money which is to be produced by the sale of land, he having an interest or charge upon the land till that money is realized, and in a state to be paid to him as money." As to Count Antoine, his position was the same as regards so much of the benefit taken by Count Nicholas under Count Richard's will as passed to Count Antoine upon the intestacy of Count Nicholas, except that at the time of Count Antoine's death, the 500*l.* a year had ceased to be payable owing to the previous death of Count Nicholas' mother, and except as to the possible position under the Settled Land Act, 1882. The rights and interests of Count Nicholas and Count Antoine, under or by virtue of the will of Count Richard in relation to the Birmingham freeholds and the proceeds of sale thereof being such as I have described, are those rights and interests more properly to be classified as immovable property, or as movable property? In my opinion, they should be classified as immovable property equally with the freehold land out of which the money is eventually to be paid. That is the conclusion to which I have come independently of the Irish decision to which I will now refer.

In *Murray* v. *Champernowne* (1) the facts were as follows: Real estate in Ireland was vested in trustees upon trust for sale. The trusts of the proceeds of sale (in the events which happened) were for such persons as Alexander Murray, a domiciled Scotsman, should by deed or will appoint. He died in 1865, having by a will made in 1862 given the residue of his property to his wife, Eugenia Grace Murray, for life, and appointed her his residuary legatee. It was held that the effect of this will was to vest in Eugenia Grace Murray absolutely all the property over which Alexander Murray had the before-mentioned power of appointment. Alexander Murray died in 1865. Probate of this will in common form was in 1866 granted by the Principal Probate Registry in Dublin to the executor therein named. It subsequently transpired that this will, though duly executed in accordance

(1) [1901] 2 I. R. 232, 236, 237.

with the Wills Act, was invalid according to the law of Scotland. Eugenia Grace Murray died in 1897, having by her will (which had been proved in England and resealed in Ireland) given the residue of her property real and personal to one Philip Murray whom she appointed her executor. The action was brought to obtain revocation of the probate granted in 1866. The real estate in Ireland, which was subject to the trust for sale under the settlement, was in fact still unsold. The probate was revoked, but the question arose whether, since the will was duly executed in accordance with the Wills Act, there should not be a decree for a limited grant; in other words, whether the will, being valid according to the law of Ireland (where the lands were situate), was not operative as an execution of Alexander Murray's general power of appointment over the proceeds of sale of the land. For this purpose it was necessary to determine whether the property subject to the power was immovable property or movable property. It was argued that the lands were equitably converted into money and that the property subject to the power was therefore movable property which the will was invalid to pass. In a considered judgment Andrews J. held that the property subject to the power was immovable, and gave Philip Murray liberty to apply for a grant to him of letters of administration with the will annexed, limited to such estate and interest in the lands, or the proceeds of sale thereof, as Alexander Murray had power to appoint, in so far as he did, by the paper writing purporting to be his last will, appoint the same, and in so far as the same, so appointed, passed under the will of Eugenia Grace Murray. The material portion of the judgment is at pp. 236 and 237 of the report. [His Lordship then read the passage: "It is settled law . . . . movable or immovable."] The learned judge then proceeds to give another ground upon which the same result would be reached; but the primary ground for his decision is his conclusion that the property subject to the power must be treated as immovable property. That decision seems to me to cover the exact point and is in my opinion right. The note in the first edition of Dicey's

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Conflict of Laws (published in 1896) to which Andrews J. refers runs as follows: " A question may be raised whether, when a person domiciled in a foreign country, e.g. France, dies intestate leaving English realty which has been converted into personalty (see pp. 312, 313 *ante*) the succession thereto is governed by the *lex domicilii* or the *lex situs*? Semble, it is governed by the *lex situs*." That note does not appear in the second edition or in the third edition; but curiously enough the second edition (published in 1908) contains no reference to *Murray* v. *Champernowne* (1), while the third edition (published in 1922) refers to the case more than once and without any adverse comment. In all three editions, however, is to be found the statement cited by the Master of the Rolls in *In re Hoyles* (2): " Immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests." So far as another great English authority is concerned (I refer to the late Professor Westlake) the position is this. In his third edition (published in 1890) at p. 189, in § 158, he appears to contemplate that moneys produced by sale of immovables might, in their situs, be considered to represent the immovables and be subject to the same rights. In his fourth edition (published in 1905) at p. 203, and his fifth edition (published in 1912) at p. 221, the wording of § 158 is altered, and runs thus: " Money substituted for an immovable by the *lex situs* is subject to the same rights as the immovable, but, when an immovable is sold under a disposition made by the owner or in consequence of a dealing with it by the owner, the rights to which it was subject as an immovable do not affect its proceeds unless kept alive against them by the will of parties or by the *lex situs*." Neither the fourth nor fifth editions refers to the case of *Murray* v. *Champernowne*. (1) In the sixth edition, however (published in 1922), Mr. Bentwich (at p. 209) refers to that case and throws doubt on the correctness of the decision. In my opinion this doubt is not well founded.

On behalf of the Countess Szokolyi it was argued that according to English law land directed to be sold and turned into money must be considered to be money; and that on the principle that equity considers done what should be done, the Birmingham freeholds are, in the eye of the law, money. This argument, to be effective, must add the words "for all purposes." That the Birmingham freeholds are to be treated as money for some purposes, no one doubts. Thus the interest of the taker is personal estate. But this equitable doctrine of conversion only arises and comes into play where the question for consideration arises as between real estate and personal estate. It has no relation to the question whether property is movable or immovable. The doctrine of conversion is that real estate is treated as personal estate, or personal estate is treated as real estate; not that immovables are turned into movables, or movables into immovables. As Farwell L.J. pointed out in *In re Hoyles* (1) the fact that a mortgage is regarded as personal estate for certain purposes in questions between our fellow subjects here has no bearing on the question whether such a mortgage should be regarded as a movable or not in questions of international law.

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(1) [1901] 2 I. R. 232.

(2) [1911] 1 Ch. 179, 183.

Various authorities were cited in support of Countess Szokolyi's claim which I will now refer to. *Forbes* v. *Steven* (2) was a decision of Sir William James. The question for decision was whether legacy duty was payable under the will of a domiciled Englishman on his share of the proceeds of partnership real estate in Bombay which was sold after his death. The testator died in 1849. The real estate in question was not sold until 1864, and in 1867 the share of the testator in the proceeds of sale was transferred to the account of his executors. The Inland Revenue claimed that legacy duty was payable on this share as arising from property impressed by the partnership contract with the character of personal estate and devolving in that character on the testator's legatees. The Vice-Chancellor decided in favour of the claim on the ground that the produce of a partnership asset was personal estate, that the residuary legatees only took it because it was personal estate, and that they must take it subject to the legacy duty imposed on residuary legatees. That case had nothing to do with the question whether the interest in the Bombay real estate (which in equity was personal property) was movable property or immovable property. *In re Stokes* (1) was cited as a case in which North J. had in effect held that an interest in partnership land or in land agreed to be sold was movable property. The testator, Robert Stokes, was a domiciled Englishman, who was in partnership with his brother, John Stokes, in the business of sheep breeding. The testator was entitled to four-sevenths of the partnership property. Part of the partnership property consisted of a freehold estate in New Zealand called the Milbourne Estate. There was a question whether this was converted under an agreement between the partners, or whether it was converted by being part of the capital of the business. North J. held that, upon either view, the estate was subject to a trust for conversion. The testator by his will had disposed of all those, his four equal seventh shares and all other, if any, the estate and interest which he might at the time of his death possess or have power to dispose of in the Milbourne Estate upon certain trusts. North J. held that what was disposed of by the words of the will was his interest under his agreement with his brother by virtue of which he was entitled to receive: "not four-sevenths of the estate, or four-sevenths of the proceeds, but a share amounting to four-sevenths of the surplus after making all the deductions that were necessary in respect of expenses and also bringing into hotchpot any advances that either of the brothers had received and which ought to be set against his share." The learned judge then describes that interest as personal estate, as a credit to which the testator was entitled in respect of the estate. In these circumstances North J. held that legacy duty was payable in respect of that interest. He followed *Forbes* v. *Steven* (2), the liability to legacy duty depending not on whether the interest was a movable or immovable but on whether or not it was personal estate. He nowhere decides that the interest was movable property. *Du Hourmelin* v.

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(1) [1911] 1 Ch. 179, 187.

(2) L. R. 10 Eq. 178.

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(1) 62 L. T. 176, 178.

(2) L. R. 10 Eq. 178.

Sheldon (1) was also relied upon, as showing that an interest in the proceeds of sale of land devised upon trust for sale was not an interest in land. The question arose because some of the persons entitled to contingent reversionary interests in the proceeds of sale were aliens; it was alleged by the purchaser on a sale under order of the Court that such interests could not be held against the Crown, and that consequently the Crown had a title over which the vendors had no power. The Master reported that a good title could be made, to which report exceptions were taken. Lord Langdale overruled the exceptions, pointing out that there was no vested interest in any alien, and holding that the species of interest in land which the will gave to aliens did not entitle the Crown to take the benefit of the proceeds of sale given to such aliens. The case does not really assist me upon the question whether such interest is movable property or immovable property. So, too, with the case of *In re Lyne's Settlement Trusts* (2), which was merely a decision that an interest in the proceeds of sale of land held on trust for sale, but not yet sold, was personal estate within the meaning of Lord Kingsdown's Act. Peterson J. (construing the words "personal estate" in the latter Act by reference to the definitions of "real estate" and "personal estate" in the Wills Act) held it was an interest in real estate. The Court of Appeal held it was personal estate within the meaning of Lord Kingsdown's Act. Here again the question for decision did not raise the point whether being personal estate it was or was not a movable or an immovable. *In re Gunn* (3) decided that a will exercising a general power of appointment over the proceeds of sale of real estate settled upon trust for sale but still unsold was a will disposing of personal estate and entitled to probate. I get no assistance either from that case or the cases of *In re Smyth* (4), and *In re Piercy* (5), upon the question whether the property under discussion here is a movable or an immovable. I can find no real ground in the various authorities which were cited on behalf of Countess Szokolyi for altering the view which I have already expressed, that the beneficial interest in relation to the Birmingham freeholds and the proceeds of sale thereof owned by Count Nicholas and Count Antoine at their respective deaths was immovable property according to English law.

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(1) 1 Beav. 79.
(2) [1919] 1 Ch. 80.
(3) 9 P. D. 242.
(4) [1898] 1 Ch. 89.
(5) [1895] 1 Ch. 83.

I answer the second question in the summons by declaring that the persons or person beneficially entitled to the proceeds of sale of the Birmingham freeholds and to the rents and profits thereof until sale are the persons or person who would be entitled thereto according to the law of England.

The costs of all parties to the summons, incurred since the date of the order of Eve J. of February 19, 1914, must be taxed as between solicitor and client, and raised and paid by the trustees out of the Birmingham freeholds.

Solicitors: *Capron & Co.; Leader, Plunkett & Leader.*

J. B. B. M.

DRESDNER BANK (LONDON AGENCY) v. RUSSO-ASIATIC BANK.

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1922
Nov. 30; *Dec.* 1, 5, 18.

[1920. D 365.]

Emergency Legislation—Enemy Business (London Agency)—Winding-up Order—"Assets of the business"—Action in the Name of the Business—Descriptive Words—Trading with the Enemy Amendment Act, 1916 (5 *&* 6 *Geo.* 5, *c.* 105), *s.* 1.

In June, 1914, the defendants, by their Paris Branch, drew ten bills of exchange, payable in London three months after date, on the Dresdner Bank. The Dresdner Bank accepted the bills at their London Branch and received as security Russian promissory notes. The defendants provided no funds to meet the bills when they fell due and, under an arrangement between the Treasury and the Bank of England, the amount payable was discharged by the Bank of England. By 1917 the Dresdner Bank in London had repaid the sum due for principal and interest to the Bank of England. In 1918 the Board of Trade, under the Trading with Enemy Amendment Act, 1916, ordered the business carried on by the Dresdner Bank in London to be wound up, and appointed a controller to wind up the business, with power to collect all moneys owing to the bank and to bring actions in the name of the bank :—

Held, that the transaction was part of the "business" of the London Branch of the Dresdner Bank, that the defendants' liability to put the Dresdner Bank in funds to meet the bills was an asset of the London Branch within s. 1 of the Trading with the Enemy Amendment Act, 1916, even if the London Branch accepted the bills on the instructions of the head office in Berlin and debited the current account of the head office with the amount paid on the bills, and that the defendants were liable to repay the plaintiffs the money paid by them to the Bank of England in respect of the bills with simple interest at 5 per cent. on each instalment from the date of payment.

Held, also, that the action by the controller in the name of the Dresdner Bank (London Agency) was not an action in the name of a branch of that bank but an action in the name of the Dresdner Bank, and that the addition of the words "London Agency," being merely descriptive, did not change the plaintiffs from being the Dresdner Bank into something unknown to the law as a legal person.

FOR some years before the outbreak of war in 1914 the Dresdner Bank had been in the habit of engaging in financial transactions with the defendants, the Russo-Asiatic Bank, of the following nature. The defendants by their Paris Branch would draw bills of exchange on the London Branch of the Dresdner Bank payable to the order of third parties. The Dresdner Bank by their London Branch would accept the bills. Before the bills matured the defendants by their London Branch would place the London Branch of the Dresdner Bank in funds to meet the bills, and the bills would accordingly be met by payment by the London Branch of the Dresdner Bank on presentation. Letters from the defendants at Petrograd would be written to the London Branch of the Dresdner Bank in one or other of the forms referred to in the evidence as A, B, and C. They were all to the same effect, though the wording varied. Form A, which was most commonly employed, was as follows: "In order to cover the drawing of 30,000*l.* which will fall due on 11th July and which appears to the debit of the account of your Head Office with you, we request you to credit the latter with a similar amount, debiting our cheque account therewith. Our Branch in your city will pay you on 10th July 30,000*l.* (thirty thousand pounds sterling) with which amount we request you to be so good as to credit us in the aforesaid cheque account."

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These financial transactions were arranged between the Dresdner Bank and the defendants through their head offices in Berlin and Petrograd respectively, the branches of the two banks in Paris and London acting in pursuance of general or specific orders from their respective headquarters.

In June, 1914, the defendants, by their Paris Branch, drew ten bills of exchange on the Dresdner Bank, London, each for 5000*l.*, and payable three months after date to the order of Messrs. Haarbleicher and Schumann in London. The Dresdner Bank, by their London Branch, accepted the ten bills, and as security for the acceptances received and retained at their London Branch certain Russian promissory notes for a total amount of 755,000 roubles payable in Russia. The ten bills were due for payment in London on September 22, 1914. In the meanwhile the war had broken out, and the due date had been extended by the provisions of the moratorium until November 5, 1914. No funds to meet the bills were provided by the defendants. The London Branch of the Dresdner Bank, which bank was liable to meet the bills at maturity in London, availed themselves of the scheme arranged between the Treasury and the Bank of England in September, 1914. The bills were approved and were taken up and the amount payable thereon was discharged by the Bank of England. The Dresdner Bank accordingly through its London Branch became liable to the Bank of England under the scheme for the amount so paid by the Bank of England, together with interest thereon at the rate of 2 per cent. per annum above bank rate. The Dresdner Bank in London subsequently made various payments to the Bank of England in respect of principal and interest totalling 57,314*l.* 17*s.* 10*d.*, the final payment, clearing off their indebtedness to the Bank of England, being made on June 20, 1917. Of those payments, four payments, amounting to 7013*l.* 11*s.* 2*d.*, represented interest, and two payments, amounting to 50,301*l.* 6*s.* 8*d.*, represented principal.

On July 15, 1918, the Board of Trade made an order, under the Trading with the Enemy Amendment Act, 1916, requiring that the business carried on in the United Kingdom by the Dresdner Bank should be wound up, appointing Mr. Brougham as controller to conduct the winding up of the business, and conferring on him sundry powers to get in and collect all moneys owing to the bank, and to bring any action or other legal proceedings in the name of and on behalf of the bank. On March 1, 1920, the writ in this action was issued. The plaintiffs asked for a declaration that the defendants were liable to repay to them the moneys actually paid to the Bank of England with 5 per cent. interest on each amount so paid from the date of payment, for an account on that footing, and payment of the amount found due on the account.

Maugham K.C. and *C. A. Bennett* for the plaintiffs. The business which the Board of Trade may order to be wound up is treated by the Trading with the Enemy Amendment Act, 1916, as an entity separate and distinct from any other property, whether in the United Kingdom or abroad, and from any other business, not in the United Kingdom, of the company owning or controlling it. It is only the assets of the business, as distinct from the general assets of the company, that are made under the Act available for discharging the debts of the business : *In re Goldschmidt, Ld.* (1) The business to which the order relates, with all its assets and with all its claims on those assets, is treated by the Act as a unum quid: *In re Kastner & Co.* (2) The sum claimed here is an asset of the unum quid. It was the duty of the London Agency to pay the bills when they fell due, and to recover the indemnity to which it was entitled. The collection of those moneys was part of the business ordered to be wound up under the Act, and the assets when recovered would be part of the assets of the unum quid. For the purpose of ascertaining whether the business is a unum quid it is immaterial whether a particular transaction was carried out on the instructions of the head office in Berlin. When the

(1) [1917] 2 Ch. 194.

(2) [1917] 1 Ch. 390.

Dresdner Bank (London Agency) debited the Dresdner Bank, Berlin, with the 50,000*l.* paid on the bills, the transaction in a legal sense had no meaning—one's right hand does not owe one's left 50,000*l.* The entries were mere book-keeping entries to show what profits one branch of the Dresdner Bank was making, and do not indicate that the head office was a debtor of the London Agency in respect of the sum. The plaintiffs are entitled to recover the sum paid to the Bank of England, with interest at 5 per cent. from the date of the payment of each instalment: *In re Tillmann.* (1) This is an action in the name of the Dresdner Bank whose business in the United Kingdom has been ordered to be wound up under the Trading with the Enemy Amendment Act, 1916. The addition of the words "London Agency" merely indicates that the controller is exercising the rights conferred on him by the Act in respect of the business he has been ordered to wind up.

Schiller K.C. and *H. G. Robertson* for the defendants. A corporation is indivisible. The Dresdner Bank in London is not another thing from the Dresdner Bank in Berlin, and this action being brought in the name of a branch of the bank, which, as such, has no legal status, there is no plaintiff who is entitled to sue. There is no debt owing to the Dresdner Bank (London Agency).

The legal persona is the Dresdner Bank, and the Trading with Enemy Amendment Act, 1916, does not purport to interfere with the activities of a corporation not registered within the jurisdiction. The licence to carry on business, granted by the Secretary of State to the London Agency of the Dresdner Bank, is in terms a licence to the Dresdner Bank. If the current account of the head office was in credit at the London Branch at the time the bills were paid the right of the London Branch has been satisfied, because that current account was debited with the amount; if the current account was not in credit then, by debiting it, the London Branch substituted a claim on the head office for its claim against the drawers of the bills. Transactions which appear in the books as completed cannot be treated as "business" of the London Branch. The London and Paris Branches of the Dresdner and Russo-Asiatic Banks respectively were instruments for carrying out the instructions of their head offices. The real business was between Petrograd and Berlin.

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(1) (1918) 34 Times L. R. 322.

As to the meaning of "business" see *In re Direction der Disconto Gesellschaft* (1) where a claim for salary was made by the London manager although the contract, as here, was made abroad. It was held that the claim was not a debt of the business within the Trading with the Enemy Amendment Act, 1916, and was not admissible in the winding up.

This is not business of the London Branch but of the Berlin head office, which is entitled to be indemnified by the drawers of the bills. The Trading with the Enemy Amendment Act, 1916, is confined to business in the United Kingdom, but in this case there was no obligation to discharge the indebtedness of Petrograd to Berlin by a payment in London. The payment could have been arranged through any branch. Before the controller can maintain an action he must show that the sum claimed is one of the assets of the business he is appointed to control and that this right to indemnity was not such an asset is shown by the course of business before the war.

Dec. 18. RUSSELL J. [after stating the facts continued :] In such circumstances there can be no doubt that there was a contractual liability on the defendants to put the Dresdner Bank in funds at its London Branch to meet the bills when they fell due, and to indemnify the Dresdner Bank against the consequences of a failure to provide funds. The plaintiff is described in the writ as the Dresdner Bank, followed by the words "London Agency" in brackets. The defendants are the Russo-Asiatic Bank. The claim of the plaintiffs as presented to me is for a declaration that the defendants are liable to repay to the plaintiffs the moneys actually paid to the Bank of England with 5 per cent. interest on each amount so paid from the date of its payment, for an account on that footing, and payment of the amount found due on the account. A variety of defences are raised, some only of which were argued before me, and these I will now deal with.

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(1) [1920] 1 Ch. 69.

It was argued that this particular transaction was not business of the London Branch of the Dresdner Bank at all, that it was not business which the controller could wind up; and that the contractual right of the Dresdner Bank to be indemnified against failure by the defendants to provide the funds to meet the bills was not an asset of the business which the controller could recover. To make these propositions intelligible and to explain the basis on which they rest I must say a word about the books of the London Branch of the Dresdner Bank. There is no doubt that as a matter of book-keeping the London Branch dealt with the matter as follows: They kept accounts in their books as between themselves and the head office. When on instructions from the head office the London Branch accepted bills, the amount was debited to the long drafts account. When they paid the bills they would credit the long drafts account and debit the current account. Securities held by the London Branch for the bills were put into a depot for account of the head office. The books treat the matter as if the London Branch was acting as agent for the head office. That was the course pursued substantially throughout. In this particular instance when the bills were paid the head office account was debited with the amount. Two more facts are relevant, commission was charged in the books as between London and Berlin, and before the war the Berlin current account was always in credit. Upon those facts it is argued that the transaction originated in Berlin, that it was carried through by the London Branch merely as agent of Berlin, and that it was not business of the London Branch at all but Berlin business. It is further said that the London Branch having carried the amount paid on the bills to the debit of the Berlin current account the claim of the London Branch has been satisfied because Berlin was in credit with London; or if Berlin was not in credit, the London Branch by debiting such amount

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to Berlin has substituted a claim on Berlin for its claim against the drawers of the bills. So far as the London Branch is concerned therefore the matter is already wound up, and is not business which the controller can wind up. That is the argument. The fact that the transaction originated in Berlin appears to me to make no difference. If it does it is difficult to see what assets of the business there could be if you exclude all assets which owe their inception and existence to Berlin. Every transaction of loan made by the London Branch originated under authority derived from Berlin either general or special. Every asset acquired by the Dresdner Bank in London was acquired under authority from Berlin either general or special. Nor does the form of book-keeping, in my opinion, affect the situation. The entries are book entries and nothing else ; they record no real transaction between separate persons at all. A debit against Berlin means nothing from the legal standpoint ; it represents no debit due from one to another, any more than a debit by a man against himself. The debit of the moneys paid in respect of the bills against Berlin, or of a commission against Berlin, record no legal indebtedness by Berlin to London. These entries, although useful and convenient for many purposes of the Dresdner Bank, as for example, for the purpose of ascertaining the progress of the branch or its profit and loss account, are in my opinion irrelevant to the solution of the question which I have to consider—namely, was this bill transaction part of the business of the London Branch ? In my opinion it clearly was. Supposing the Bank of England had not taken the bills, and Haarbleicher and Schumann had claimed against the controller as being creditors of the business of the London Branch, could the controller have successfully asserted that they were not creditors of the business ? In my opinion he could not and that for several reasons. If no war had intervened then in the ordinary course of business the money would have been paid by the defendants to the London Branch of the Dresdner Bank. That branch would have had and discharged the duty of paying the bills. The collection of the money to be provided by the defendants to meet the bills, and the payment of the bills at maturity was part of the business of the branch. That branch held the rouble promissory notes as security for the transaction. That security would have been realizable by the controller had it been of any value. In the events which have happened the London Branch has had to find the money for the bills and is pro tanto out of pocket.

For these reasons it appears to me that the transaction was part of the business of the London Branch of the Dresdner Bank, and that the contractual liability of the defendants to the Dresdner Bank was an asset of that business within the meaning of s. 1 of the Trading with the Enemy Amendment Act, 1916.

Another defence went only to quantum. It was argued that the full interest paid to the Bank of England could not be recovered, that interest could not be recovered on the payments made to the Bank of England in respect of interest, and that the London Branch had not acted reasonably in taking advantage of the Treasury and Bank of England scheme. As to this last point I am satisfied upon the evidence that the London Branch acted reasonably in the matter and that indeed no alternative course was open; and as to the question of quantum I am quite satisfied to follow Younger J.'s decision in *In re Tillmann* (1) and to hold that the amount to be recovered should be the moneys actually paid to the Bank of England with simple interest at 5 per cent. on each payment from the date of such payment.

The final ground of defence was that there was no plaintiff before the Court who could sue, and that the claim could not be asserted except in an action, which this was not, brought by and in the name of the Dresdner Bank. That means that this is an action not by and in the name of the Dresdner Bank but by and in the name of a branch of the Dresdner Bank, that, as such, a branch has no legal status or existence, and that as such it is incapable of maintaining an action. It is necessary to consider the provisions and

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(1) 34 Times L. R. 322.

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effect of s. 1 of the Trading with the Enemy Amendment Act, 1916. That section undoubtedly introduces conceptions novel to English law and unfamiliar to us except in the form of book-keeping entries—namely, the conception of a business with assets and liabilities treated as belonging to and due from the business rather than as belonging to and due from the persona owning the business; and the conception of a branch of a business with assets and liabilities treated as belonging to and due from the branch rather than as belonging to and due from the persona owning the entire business of which the branch is but part. For the purpose of enabling the controller to get in and realize these "assets of the business," and to discharge the debts due to creditors, which means creditors of the business, see *In re Hagelberg* (1), the Board of Trade may confer upon him powers which by the Act are defined by reference to a liquidator's powers in a voluntary winding up of a company. These powers include power to bring any action or other legal proceeding in the name and on behalf of the company: see Companies (Consolidation) Act, 1908, ss. 151 and 186. Accordingly in the present case the Board of Trade have effectively given the controller power to bring an action in the name and on behalf of the Dresdner Bank. It appears to me that by virtue of the Trading with the Enemy Amendment Act, 1916, and the Board of Trade Order, the controller here has had vested in him power to bring an action in the name and on behalf of the Dresdner Bank for the purpose of recovering any asset which may properly be described as an asset of the business the winding up of which he has been appointed to conduct. Is the present action an action brought in the name and on behalf of the Dresdner Bank? In my opinion it is. True it is that words have been added in brackets after the bank's name, but these are descriptive words which conveniently indicate that the matter in suit concerns the London Branch of the Dresdner Bank, and that the bank's name is being used by the controller in winding up the business of the London Branch. The addition of these words, after words which accurately describe the Dresdner Bank, do not change the plaintiff from being the Dresdner Bank into being some person or thing unknown to the law as a legal persona. If instead of the words "London Agency" the words in brackets had been "Old Broad Street, London," or "carrying on business in London," could it be suggested that the plaintiff was not the Dresdner Bank? I do not see on what ground such a suggestion could be made. Nor can I see how the words "London Agency" which are here added in brackets can have any different or greater effect.

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(1) [1916] 2 Ch. 503.

For these reasons the various defences raised all fail.

I make a declaration that the defendants are liable to repay to the plaintiffs a sum equal to the various payments set out in the exhibit H.C.1, plus interest at 5 per cent. on each such sum from the date of each payment, and order the defendants to pay such sum accordingly. This is on the footing that the amount can be agreed and inserted in the judgment. Otherwise there must be an account with an order to pay what shall be found due on such account. The defendants must pay the costs of the action.

Solicitors: *Peter Thomas & Clark*; *Gilbert Samuel & Co.*

J. B. B. M.

EVE J.

1922

Jan. 13;
Dec. 13, 19.

In re MANNERS.

MANNERS *v.* MANNERS.

[1921. M. 1933.]

Will—Construction—" Bonds and moneys "—Debenture Stock—Certificates not under Seal—Will in Spanish Language—Letters of Administration in England—Certified Translation—English Domicil—Intestacy.

A testator whose domicil was English while residing in Nicaragua made his will in the Spanish language, leaving to his wife for life three-fourths of the income derived from the "bonds and moneys" then deposited with a specified bank in London. Upon the death of his wife this same income was to be paid to his sister F. E. M., and the income of the other one-fourth was to be equally divided between F. E. M. and a brother. No executor was appointed by the testator, and there were no children of the marriage. The testator's widow died on November 15, 1918. On April 27, 1920, letters of administration with the will annexed of the testator's estate were obtained by F. E. M. from the Probate Registry in England, and a translation of the will into English was registered with it. At the bank in London there were deposited fifteen securities consisting of bonds to bearer, debenture stocks and one sum of inscribed stock. Two of the certificates of debenture stock were not under seal. There was evidence that "bonds" was the correct translation of the Spanish word "bonos" used by the testator:—

Held, (1.) that the language of the Spanish will must be looked at to ascertain the equivalent expressions in English.

Reynolds v. *Kortwright* (1854) 18 Beav. 417 followed.

Held, (2.) That, in the absence of sufficient proof of any special local meaning of the Spanish word, the word "bonds" did not include the stocks the certificates of which were not under seal, and the testator died intestate as to these two items of debenture stock as well as to the inscribed stock.

ADJOURNED SUMMONS.

By his will dated September 18, 1915, Ernest Calvert Manners, a native of Cheltenham in England, and then residing at Laguna de Perlas in Nicaragua, gave to the plaintiff (his sister), Florence Edith Manners, residing in Cheltenham, the income derived from the property known by the name of Snilesworth Estates, Yorkshire, England. He then gave to his wife, Mercedes Castillo de Manners, a native of Nicaragua, all the property such as money, houses, lands, and movables, situated in the town of Lacuna de Perlas, which he might possess at his death to be hers alone. He also gave to his wife for her use during her lifetime, "three-fourths of the income derived from the bonds and moneys now deposited in the hands of Messrs. Drummond & Co., London, England"; upon her death this same income was to be paid to F. E. Manners; the other fourth of the income derived from the bonds and moneys was to be equally divided between F. E. Manners and her brother the defendant Charles Walter Manners, residing at Cheltenham: "The said bonds and moneys are to be converted into a species of trust under the supervision of the official Trustee for the distribution of the income derived from the said bonds and moneys" as to three-fourths to his wife and the other fourth to be equally divided between F. E. Manners and C. W. Manners. The testator lastly directed that all his just debts at the time of his death should be paid out of the property, bonds, and moneys existing in his possession. The will was drawn up in Nicaragua and was written in the Spanish language, with which the testator was familiar. No executor was appointed. The testator died on September 20, 1915, and there were no issue of the marriage. The widow obtained possession of all the testator's property in Nicaragua and died on November 15, 1918, at New Orleans in America.

The defendant, Samuel David Reed, was now the representative of her estate. On April 27, 1920, letters of administration, with the will annexed, of the estate of the testator, were obtained out of the Principal Probate Registry by the plaintiff, and a translation of the original will was registered with it. On May 23, 1921, an originating summons was taken out by the plaintiff, to which C. W. Manners, the trustee in bankruptcy of J. E. Manners (the heir at law of the testator), and S. D. Reed were made respondents. The plaintiff asked first for an inquiry as to the domicil of the testator, and if the domicil were found to be English whether fifteen specified securities consisting of bonds, debenture stocks, and 500*l.* 4 per cent. Inscribed Stock of the Union of South Africa, deposited at Drummond's Bank, were all included in the expression "bonds and moneys now deposited in the hands of Messrs. Drummond & Co." Two of the

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investments in debenture stocks were represented by certificates for 500*l.* respectively not under seal. The plaintiff admitted that the 500*l.* Inscribed Stock of the Union of South Africa did not pass under the term "bonds." The inquiry as to domicil was held and the Master certified that the domicil of the testator at the date of his marriage and of his death was English.

It appeared that the testator was formerly entitled to a share in a freehold estate of 5140 acres in Yorkshire known as the Snilesworth Estate, and also to two fee farm rents of 12*l.* 10*s.* and 71*l.* 4*s.*, believed to be also charged on lands in Yorkshire, but not part of the Snilesworth Estate. His share of the income derived from this property was credited to the testator's account at Messrs. Drummond & Co. In 1912 the Snilesworth Estate was sold and the testator's share in the proceeds was paid into his account at Messrs. Drummond's Bank and invested in bearer bonds, various debenture stocks and inscribed stock. The fee farm rent of 12*l.* 10*s.* was also sold, and the testator's share of the proceeds was lodged in Drummond's Bank. The other fee farm rent of 71*l.* 4*s.* remained unsold.

The heir at law of the testator was his brother, John Edward Manners, who had been adjudicated a bankrupt on February 16, 1914, and Thomas Easton was now his trustee in bankruptcy. The next of kin of the testator were his three brothers J. E. Manners, C. W. Manners, H. C. Manners, and his sister, the plaintiff.

A further question was asked by the summons as to who was entitled to the share in the fee farm rentcharge of 71*l.* 4*s.* The gross value of the estate in the United Kingdom was 7054*l.* 5*s.* 2*d.* Evidence was given on behalf of the plaintiff by Don Juan de Callejon, a member of the Spanish Bar and counsel to the Spanish Embassy, to the effect that the Spanish word "bonos" in the original will of the testator was rightly translated "bonds" in the English translation. He stated that the word "bono" in the singular was an antiquated Spanish adjective meaning good, and had no defined legal meaning. The word "bonos" was colloquially used to signify shares of any nature other than the equivalent to English preference or ordinary shares, it had a wider meaning than the word "moneys." According to Spanish law it was not essential that a bond of any kind should be sealed.

Gover K.C. and *Bischoff* for the plaintiff. The Court can look at the original will to ascertain the construction to be put upon it. The word "bonos" was proved by the Spanish witness to be a wider expression than "moneys" and it might well include bonds not under seal, as there appeared to be no distinction in Spain between deeds under seal and those not under seal: *In re Taylor* (1); *In re Cliff's Trusts* (2); *In re Battie-Wrightson.* (3)

Dighton Pollock for C. W. Manners.

Earengey for the trustee in bankruptcy of J. E. Manners. The Court cannot go behind the English translation of the word "bonos," which was proved to be correctly translated "bonds." By English law, which governs this will, bonds are instruments under seal. No evidence was given as to any wider meaning of the word "bonos" by Nicaraguan law, as the witness was not a member of that Bar. There is therefore an intestacy as to those securities deposited at Drummond's Bank the certificates of which were not under seal.

W. A. Peck for the representative of the widow.

EVE J. [after stating the facts continued:] The will, though made in the Spanish language, with which the testator was well acquainted, falls to be construed by the law of England, the country of his domicil, and the first question is whether, for the purposes of construction, I ought to have recourse to the original will in the Spanish language, or to the translation of it into English, or to both. The circumstances here are not quite the same as they were in the case before North J.: *In re Cliff's Trusts.* (2) There it was an English translation of a French will that had been admitted

(1) [1922] 1 Ch. 569.
(2) [1892] 2 Ch. 229.
(3) [1920] 2 Ch. 330.

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to probate, and the correctness of the translation was impugned. North J. held that he was bound to look at both. Here the Spanish will has been admitted to probate in England and a translation into English has been registered with the original. These facts bring the case within the authority of *Reynolds* v. *Kortwright* (1), and reading this as an English will I must look at the effect of the Spanish language in order to ascertain what are the equivalent expressions in English. Merely looking at the will does not advance me in that direction; I require the assistance of those conversant with both languages. I start with the registered translation certified to be a true and faithful translation from Spanish into English of the will and therein I find the word over which the controversy has arisen is translated into "bonds." Additional evidence has been produced to the effect that such translation of the word is correct and proper. This has been met by further evidence that the word in question, "bonos," is an antiquated word no longer to be found in current Spanish dictionaries and that it was formerly used as an adjective meaning "good."

In this condition of affairs I do not feel justified in holding that those on whom the burden lies of showing that the will has been mistranslated have established their case.

But then it is said that even if the word be correctly translated as "bonds" the Spanish equivalent of the word "bond" has a wider meaning than the English word, in that it includes documents not under seal, and accordingly that in ascertaining the English equivalent of the word used by the testator I ought to affix a meaning to the word which would give it a construction co-extensive with that of the Spanish word.

I am not satisfied that this is the result of the evidence, but even if it is I am in this difficulty, that the evidence in question is directed solely to the construction that would be imposed on the word in Spain. I have no evidence of what would be the construction put upon the word in Nicaragua where the testator was long resident and where his will was made.

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(1) 18 Beav. 417.

In these circumstances I really have no materials for holding that in construing this English will I ought to apply to the word "bonds"—admittedly a correct translation of the Spanish word used by the testator—any other meaning than that which would be applied to the use of the word in a will made in the English language.

Accordingly, I must hold that it does not include stocks the certificates of which are not under seal, and that the testator died intestate as to the two items of debenture stock. It is admitted that in any case he died intestate as to the 500*l.* of inscribed stock, and there is also an intestacy with regard to the fee farm rentcharge. The costs will be paid rateably out of the undisposed of personalty and realty.

Solicitors: *Merriman, White & Co.; Iliffe, Sweet & Co.; Guedalla, Jacobson & Spyer.*

G. M.

In re DAVIS.

THOMAS *v.* DAVIS.

[1922. D. 2245.]

SARGANT J.
1923
Jan. 19, 25.

Will—Gift for "Charitable or public institutions in Wales"—Validity.

By his will dated May 3, 1918, a testator, after making certain specific and pecuniary bequests and giving an annuity to his wife, devised and bequeathed all his real and personal estate not thereby otherwise disposed of upon trust for conversion and investment of the net residue as therein mentioned. And he directed his trustees "to hold the residuary moneys and investments upon trust (subject to payment of the wife's annuity) to pay and apply the same for the benefit of one or more charitable or public institutions in Wales as they may deem advisable in their absolute discretion and in such proportions and shares as they may deem fit":—

Held, that the non-charitable objects of the residuary gift were too vague, and that the whole gift failed for uncertainty.

Hunter v. *Attorney-General* [1899] A. C. 309 applied.

ADJOURNED SUMMONS.

By his will dated May 3, 1918, Richard Rhys Davis, after making certain specific and pecuniary bequests and giving

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an annuity of 200*l.* to his wife during her life, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees upon trust for conversion but with power to postpone the same. The testator then directed his trustees out of the moneys arising from such conversion to pay his funeral and testamentary expenses, debts and legacies, and to invest the residue of the said moneys as therein mentioned. And the testator declared that, subject to the payment of the annuity to his wife, he directed his trustees to hold the residuary moneys and investments upon trust "to pay and apply the same for the benefit of one or more charitable or public institutions in Wales as they may deem advisable in their absolute discretion and in such proportions and shares as they may deem fit."

This summons was taken out by the trustees asking whether the direction in the testator's will (subject to the payment of the annuity of 200*l.*) to hold the residuary moneys and investments upon trust to pay and apply the same for the benefit of one or more charitable or public institutions in Wales as they might deem advisable was valid or void.

Adams for the trustees.

Greene K.C. and *Christie* for the widow. The gift of residue is void for the reason that the non-charitable objects of the gift, "public institutions in Wales," is too uncertain. The gift must be read disjunctively, and when a gift is partly charitable and partly non-charitable, the whole gift fails, if the non-charitable portion is too vague: *Hunter* v. *Attorney-General* (1); Theobald on Wills, 7th ed., p. 369; *Blair* v. *Duncan* (2); *Grimond* v. *Grimond.* (3) A testator cannot give some one else what is in effect a power to make a will for him: compare *Bannerman's Trustees* v. *Bannerman* (4), where however a gift to religious or charitable institutions conducted according to Protestant principles was held valid. The only difficulty in this case arises from dicta suggesting that a gift for public purposes might be validated by the addition of a local limit: *Shaw's Trustees* v. *Esson's Trustees* (1); *Houston* v. *Burns.* (2) It is submitted that what is contemplated is a restricted local limit that will reduce the number of possible public purposes to a number from which the trustees can easily make a selection. Wales is altogether too wide an area. Within it there is an indefinite number of public institutions. No trustee could make a complete list from which to select.

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(1) [1899] A. C. 309, 323.

(2) [1902] A. C. 37.

(3) [1905] A. C. 124.

(4) 1915 S. C. 398, 405.

Moreover the expression "public institutions" is in itself too vague. What is the criterion? Apparently an institution might be "public" because it was under public control, or maintained by public subscription, or carried on for the benefit of the public. Compare also the definition of "institution" in the Oxford Dictionary and Webster's Dictionary.

[They also referred to *Caldwell* v. *Caldwell* (3); *In re Allen.* (4)]

Dighton Pollock for the Attorney-General. The gift to public institutions in Wales is within the fourth definition in *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (5) It is not suggested that this part of the residuary gift is charitable, and admittedly a gift to charitable or public "purposes" would be invalid. But a gift to charitable or public institutions within a limited area is valid: *Houston* v. *Burns.* (6) The earlier authorities show that a local restriction will render valid a gift that is otherwise too vague: *Dolan* v. *Macdermot.* (7) A gift to public institutions in Wales must be construed as equivalent to institutions benefiting the public of Wales, as, for example, the Welsh University. This is a stronger case than *In re Allen.* (4) In *Grimond* v. *Grimond* (8) there was no local limitation,

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(1) (1905) 8 F. 52, 54.

(2) [1918] A. C. 337, 341, 348.

(3) (1921) 91 L. J. (P. C.) 95.

(4) [1905] 2 Ch. 400.

(5) [1891] A. C. 531, 581, 583.

(6) [1918] A. C. 337, 341.

(7) (1867) L. R. 5 Eq. 60; (1868) L. R. 3 Ch. 676.

(8) [1905] A. C. 124.

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and in *Blair* v. *Duncan* (1) the gift was for public purposes, which is far wider than a gift for public institutions: see also *In re Bennett.* (2)

Jan. 25. SARGANT J. delivered the following written judgment: The question here is as to the validity of the following residuary bequest in the will of the testator. [His Lordship read the bequest and continued:] There is no context here which admits of the word "or" being read otherwise than disjunctively, and the objects of the gift are, therefore, plainly alternative; first, charitable institutions in Wales, or, secondly, public institutions in Wales. And, further, the second or alternative objects are not necessarily charitable.

In these circumstances the law applicable to the matter is that so clearly stated in the speech of Lord Davey in the House of Lords in the leading case of *Hunter* v. *Attorney-General.* (3) I cannot do better than read the exact words Lord Davey used: "What, then, is the law applicable to the case? There are two classes of authorities. On the one hand, there is a long series of cases, extending from *Morice* v. *Bishop of Durham* (4), decided by Sir William Grant and Lord Eldon, to *In re Macduff* (5), decided by the Court of Appeal in 1896, and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as 'charitable or benevolent,' or 'charitable or philanthropic,' or 'charitable or pious' purposes), or where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility') and a discretion is vested in the trustees, the whole gift fails for uncertainty. In *Vezey* v. *Jamson* (6) the trust was to dispose of the residue in such charitable or public purposes as the laws of the land would admit, or to any persons as the trustees in their discretion should think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit. Sir John Leach said: 'The testator has not fixed upon any part of this property a trust for a charitable use; I cannot therefore devote any part of it to charity. . . . The necessary consequence is, that the purposes of the trust being so general and undefined that they cannot be executed by this Court, they must fail altogether, and the next of kin become entitled to the property.' On the other hand, it has been decided in cases such as *Attorney-General* v. *Doyley* (1) and *Salusbury* v. *Denton* (2), that where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable the trust does not fail; but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally."

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(1) [1902] A. C. 37.

(2) [1920] 1 Ch. 305.

(3) [1899] A. C. 309, 323, 324.

(4) (1804) 9 Ves. 399; (1805) 10 Ves. 521.

(5) [1896] 2 Ch. 451.

(6) (1822) 1 S. & S. 69.

Applying then the test stated in this passage, are the non-charitable objects, which in this case form the second alternative destination of the residue, definite ascertainable objects, so as to form the objects of a recognizable trust with a mere power of selection in the trustees; or are they of so shadowy and indefinite a nature as to render the trust too uncertain for execution by the Court? In my judgment the second of these two views is the correct one; and consequently the whole gift fails for uncertainty. The phrase "public institutions in Wales" is an extraordinarily wide and indefinite one, and it would be impossible to identify all the associations or societies in Wales that might be comprehended within the phrase, or even to point out exhaustively the various heads of qualification or classification which would entitle these associations or societies to be brought within the phrase.

Mr. Dighton Pollock sought to treat the alternative gift as equivalent to a gift for public purposes for or within the area of Wales. In my judgment this is not a sound construction. The gift is to institutions, that is, individual

(1) (1735) 4 Vin. Abr. 485; 7 Ves. 58n.
(2) (1857) 3 K. & J. 529.

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associations or societies of a public character, and is not a gift for public purposes. But even if the gift were to be treated as a gift for public purposes in Wales, the decision in the recent case of *Houston* v. *Burns* (1) shows that the gift would be so indefinite as to be void. Indeed, whichever way the gift is construed, the testator has not sufficiently defined the trusts within which his trustees are to have a right of selection, but on the contrary has purported to give them powers so wide and indefinite as substantially to amount to a delegation of his testamentary capacity: see the remarks of Lord Haldane in *Houston* v. *Burns*. (2)

I must therefore declare that the whole gift of residue, subject to the wife's annuity, is void, and that there is a resulting trust of the real estate for the testator's heir at law and of the personal estate for his next of kin according to the statutes of distribution.

Solicitors: *Wrentmore & Son, for Frank T. James, Merthyr Tydfil; Treasury Solicitor.*

H. C. G.

SARGANT J.
1923
Jan. 16, 22; *Feb.* 8.

In re GARDEN VILLAGE (HULL), LIMITED.

[1922. G. 099.]

Company—Memorandum of Association—Ordinary Shares—Limitation on Dividends—Reorganization of Share Capital—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 45.

Clause 5 of the memorandum of association of a company provided as follows: "The capital of the company is 200,000*l.* divided into 20,000 shares of 10*l.* each. The company has power from time to time to increase or reduce its capital, and to issue any shares in the original or increased capital as ordinary, preferred, or deferred shares, and to attach to any class or classes of such shares any preferences, rights, privileges, or conditions, or to subject the same to any restrictions or limitations. Provided always that no dividend shall be paid on the ordinary shares exceeding 3*l.* per centum per annum (non-cumulative). . . . ."

The company, which was incorporated in 1907, issued 15,064 ordinary shares of 10*l.* each. In September and October, 1922, a special resolution was passed that each of the shares of the company should be sub-divided into ten shares of 1*l.* each and that the conditions of the company's memorandum of association should be modified so that the share capital be reorganized by dividing the same into two classes of shares consisting of 40,000 ordinary shares of 1*l.* each and 160,000 deferred shares of 1*l.* each, of which each existing holder of a share of 10*l.* should receive two ordinary and eight deferred shares, the holders of the ordinary shares to be entitled to receive out of the profits a fixed non-cumulative preferential dividend for each year of 3 per cent., and the surplus profits in each year to be applicable for the payment of dividend to the holders of deferred shares. On a petition to the Court under s. 45 of the Companies (Consolidation) Act, 1908, for confirmation of the special resolution :—

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(1) [1918] A. C. 337.

(2) [1918] A. C. 342, 343.

Held, that the Court had power under the section to confirm the special resolution and that, as the only persons interested in any profits in excess of the fixed dividend payable on the ordinary shares were the shareholders themselves, the Court ought in the exercise of its discretion to confirm the resolution.

PETITION.

On August 1, 1907, the Garden Village (Hull), Ld., was registered as a company limited by shares with the object of purchasing the Holderness House Estate in the city and county of Kingston-upon-Hull and laying it out as a garden village. In 1908 the company was converted into a private company.

Clause 5 of the company's memorandum of association is as follows : " The capital of the company is 200,000*l.*, divided into 20,000 shares of 10*l.* each. The company has power from time to time to increase or reduce its capital, and to issue any shares in the original or increased capital as ordinary, preferred, or deferred shares, and to attach to any class or classes of such shares any preferences, rights, privileges, or conditions, or to subject the same to any restrictions or limitations. Provided always that no dividend shall be paid on the ordinary shares exceeding 3*l.* per centum per annum (non-cumulative). . . . ."

15,064 ordinary shares of 10*l.* each were issued and were fully paid up.

Art. 111 of the articles of association provided as follows : " Subject to the rights of the holders of any shares entitled to any priority, preference, or special privilege, the net profits of the company shall be divisible by way of dividend among the members in proportion to the amount paid up on the shares held by them respectively, but so that the dividends upon the ordinary shares shall be non-cumulative and shall not exceed 3*l*. per centum per annum. The surplus of the net profits of the company after payment of such dividends shall be devoted to such purposes as the directors shall deem best in furtherance of the objects of the company as defined by the memorandum of association."

The following resolution was duly passed as an extraordinary resolution and confirmed as a special resolution at extraordinary general meetings of the company held on September 8, 1922, and October 5, 1922, respectively :—

"(1.) That each of the existing 20,000 shares in the capital of the company of 10*l*. each be sub-divided into ten shares of 1*l*. each.

"(2.) That the conditions contained in the company's memorandum of association be modified so that the share capital be reorganised by dividing the same into two classes of shares in the manner following :—

"(*a*) The capital of the company consisting after such sub-division as aforesaid of 200,000 shares of 1*l*. each be divided into 40,000 ordinary shares of 1*l*. each and 160,000 deferred shares of 1*l*. each ;

"(*b*) each holder of an existing share of 10*l*. in the capital of the company . . . . shall surrender such share to the company and shall receive in exchange for such surrendered share two ordinary shares fully paid and eight deferred shares fully paid in the capital of the company ;

"(*c*) The holders of the ordinary shares shall be entitled to receive out of the profits of each year available for dividend a fixed non-cumulative preferential dividend for such year upon the capital for the time being paid up thereon at the rate of 3 per centum per annum ;

"(*d*) The surplus profits of each year available for dividend shall be applicable for the payment of dividend to the holders of deferred shares in proportion to the capital paid up thereon ;

> "(*e*) in a winding up the ordinary and deferred shares shall rank *pari passu* for repayment of the capital paid up thereon and shall participate *pari passu* in any surplus assets. . . . ."

The company was originally incorporated for the benefit primarily of employees of Rickett & Sons, Ld. Thus the purpose of the company was in origin to a great extent philanthropic, and it was intended that shareholders should not be entitled to a dividend comparable in amount to the dividend which they might reasonably expect on ordinary investments. Having regard, however, to the change in circumstances and conditions which had since taken place, the directors and shareholders of Rickett & Sons, Ld., considered that the holders of shares in the company should receive by way of dividend the full amount of profits available for dividend in each year and the special resolution had been passed to attain this object.

The present petition asked that the modification of the conditions contained in the memorandum of association of the company and the reorganization of the share capital proposed to be effected by the special resolution might be confirmed by the Court.

Farwell for the petition. The object of this petition is to reorganize the company's capital so as to enable larger dividends to be paid, and the Court is asked to confirm, pursuant to s. 45 of the Companies (Consolidation) Act, 1908, the special resolution passed by the company for the purpose. The company could have subdivided its shares without coming to the Court under s. 41; but when the rights of the classes of shares are fixed by the memorandum of association, they can only be altered under s. 45 by special resolution confirmed by the Court. It is a question of construction of the memorandum whether the restriction on the payment of dividends on ordinary shares fixed once for all on ordinary shares as they were issued or merely restricts the dividend on the ordinary shares for the time being. If the limitation of dividend had not been contained in the memorandum the company would have been able to remove it under s. 41 without coming to the Court: *Ashbury* v. *Watson* (1); *In re Australian Estates and Mortgage Co.* (2) So, too, if the proviso restricting dividends applies on its true construction only to the ordinary shares for the time being, this application is unnecessary, as the required alteration could be effected by the company under s. 41. It is only on the view that the restriction on dividends fixed to all shares issued as ordinary shares that this application is necessary.

[SARGANT J. So far as the removal of the 3 per cent. limitation is concerned, it is not a reorganization of capital.]

It is being effected by a reorganization of the capital into two classes of shares, one of which is to be free of the restriction. Art. 111 shows what was intended to be done with the surplus profits over and above the fixed dividend, but it confers no rights on any third parties and the capital and dividends of the company belong to the shareholders subject only to the creditors being satisfied.

The reorganization contemplated is within s. 45, and the Court has power to confirm the special resolution. That being so, the Court ought in its discretion to confirm it, seeing that there is no legal right to the profits of the company in any one but the shareholders. They are the absolute owners, and the Court ought not to refuse its sanction to the reorganization merely because the shareholders are no longer possessed of the altruistic feelings which possessed them at the inception of the company. The object aimed at could be effected indirectly by the issue of deferred shares of small nominal value or the company could go into winding up, and then, subject to the payment of its creditors, all the assets would belong to the shareholders. The object of this petition is to achieve the shareholders' object in a direct way.

Cur. adv. vult.

Feb. 8. SARGANT J. delivered the following written judgment: This is an application to the Court to confirm under

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(1) (1885) 30 Ch. D. 376.

(2) [1910] 1 Ch. 414.

s. 45 of the Companies (Consolidation) Act, 1908, a special resolution of the company modifying the conditions contained in its memorandum of association so as to reorganize its share capital by the division of its capital into two classes of shares. [His Lordship then stated the facts and continued :] The questions which I have to consider are two—namely, first whether the Court has power to confirm the foregoing resolution, and, secondly, whether such power, if available, ought to be exercised.

The first question presents no difficulty except as regards the 15,064 shares which have already been issued as ordinary shares, and which are now subject to an existing dividend limitation. But as regards these shares there is this obvious difficulty—namely, that they were issued as, and are at present, ordinary shares; that the whole of the capital represented by them is subject to the dividend limitation; that this limitation being one contained in the memorandum is prima facie unalterable : *Ashbury* v. *Watson* (1); and that though on a subdivision the dividend rights of the subdivided shares might be altered inter se within the dividend limitation at present affecting the whole mass of the existing shares, it is quite another thing to sub-divide so that in the result the two classes of sub-divided shares become together entitled to dividends which may in the aggregate exceed the limited dividend to which the original shares are restricted.

On the other hand, this view appears hardly to give sufficient effect to the alteration in the law as to memoranda of association which was first effected by s. 39 of the Companies Act, 1907, and is now embodied in s. 45 of the Companies (Consolidation) Act, 1908. In this case the memorandum of association no doubt affected, and imposed a dividend limitation on, shares which were for the time being ordinary shares within the terms of the memorandum; and having regard to the unalterability in this respect of the memorandum in the then state of the law, shares once issued as ordinary shares under the memorandum necessarily retained that character and were unalterably affected by the restrictions in question. But when under the later law the unalterability of the memorandum in this respect was removed, and ordinary shares might, at the desire of the company expressed by special resolution and with the confirmation of the Court, be converted into shares of smaller denomination which were of different classes, it would seem that these new shares would become shares of the various different classes, preference, ordinary or deferred, for all the purposes of the memorandum. And if so, the result would be that the limitation imposed by the terms of the memorandum would only apply to the shares which, in the result, had under the altered memorandum the quality of ordinary shares.

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(1) 30 Ch. D. 376.

On the whole I have come to the conclusion that the view indicated in the latter of the two last paragraphs is preferable to that suggested in the former of these paragraphs. Or in other words, the original memorandum of the company having by recent legislation become alterable with regard to the quality of some of the company's shares, the proviso in the memorandum is not more unalterable than the capital to which it relates, and may properly be held to apply to such part only of the capital of the company as still remains in the class of ordinary shares. And I think there is the more reason for adopting this more liberal interpretation of the powers given by s. 45, because any reorganization under that section requires the confirmation of the Court and will therefore be carefully controlled. Reference may be made in this connection to the views expressed by the House of Lords in the analogous case of reduction of capital: see *British and American Trustee and Finance Corporation* v. *Couper*. (1)

If then the Court has power to sanction the proposed reorganization, is this a case where the power should be exercised? This question presents little difficulty, and I am clear that it should be answered in the affirmative. The existing members of the company are alone entitled to all profits and advantages to be derived from the operations of the

(1) [1894] A. C. 399.

company, and no outside person, or class of persons, has any interest in the preservation of the present restriction on dividend, or in any profits to be accumulated through the operation of that restriction. As matters stand at present, the company might by the issue of a single deferred share give that shareholder the whole of the surplus profits available as dividend above the non-cumulative 3 per cent. dividend on the existing ordinary shares. And after the issue of such a deferred share the machinery of art. 49 could be employed to produce the result sought to be effected by the present special resolution. This being so, I think that the desired result had better be reached by the direct method now proposed; and accordingly I purpose to confirm the special resolution set out in para. 8 of the petition.

Solicitors: *Steavenson & Couldwell.*

H. C. G.

Approved. GILMOUR *v.* COATS.
[1949] 1 All E.R. 848.

RUSSELL J.
1923
Jan. 16, 17, 26.

In re HUMMELTENBERG.

BEATTY *v.* LONDON SPIRITUALISTIC ALLIANCE, LIMITED.

[1922. H. 2554.]

Charity—Bequest for College to train and develop suitable Persons as Mediums—Whether Gift for public Benefit—Question for Court and not for Testator.

To be valid a charitable bequest must be for the public benefit, and the trust must be capable of being administered and controlled by the Court. The opinion of the donor of a gift or the creator of a trust that the gift or trust is for the public benefit does not make it so, the matter is one to be determined by the Court on the evidence before it.

Suggestions to the contrary in *In re Cranston* [1898] 1 I. R. 431, 446 and *In re Foveaux* [1895] 2 Ch. 501, 505, 507 disagreed with.

ORIGINATING SUMMONS.

The testator bequeathed a legacy in the following terms: "I give and bequeath to the Treasurer for the time being of the London Spiritualistic Alliance Ltd. of 110 St. Martin's Lane, W.C. the sum of 3000*l.* to form the nucleus of a fund for the purpose of establishing a college for the training and

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developing of suitable persons male and female as mediums, preference being given to healing mediums and those for diagnosis of disease, and I direct that a committee of three of the Council shall control the said sum of 3000*l.* by investing the same in sound securities and use the interest thereof for the above express purpose of developing such mediums. It would be desirable if mediums during development could be employed in garden or farm work, such occupation might be helpful to their development. If at any time it should be found by the Council to be no longer necessary or impracticable to develop such mediums, then the said sum of 3000*l.*, or the interest thereof, or both capital and interest, shall be used for the general purpose of spreading and advancing the cause of spiritualism as seems best to the Council of the said Alliance. Should at any time the London Spiritualistic Alliance cease to exist then the said sum of 3000*l.* and interest thereof, if any, or as much thereof as remains unexpended shall be divided in equal parts between six spiritualistic societies of England as the said Council may decide."

This summons was taken out by the executors of the testator's will in order to determine whether the gift was a good charitable gift.

Errington for the executors.

G. B. Hurst K.C. and *W. A. Peck* for the defendants. This is a good charitable gift because: (1.) it is a trust for the advancement of education—namely, the education of persons proposing to follow the calling of a medium; (2.) because it is for the benefit of a section of the public; and (3.) because it is for the benefit of the community, as its special object is to train mediums to diagnose and cure diseases: *Commissioners of Income Tax* v. *Pemsel.* (1) The intention of the testator is to benefit the community; whether the community will be benefited is a question on which the Court is not required to express any opinion: *In re Foveaux.* (2) The principle is that the Court will not judge of the beneficial nature of the object: *Thornton* v. *Howe.* (3) In that case a trust to publish the works of Joanna Southcott was held a valid charity by Sir John Romilly, who considered they were written with a view to the advancement of religion. He did not think it incumbent on him to say that the religion would in fact, or according to his judgment, be advanced. He looked to the view or purpose of the writer: per Chitty J. in *In re Foveaux.* (1) The benefit must be one which the founder believes to be of public advantage, provided that his belief is rational, and not contrary to the law, or to the principles of morality: *In re Cranston.* (2)

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(1) [1891] A. C. 531.
(2) [1895] 2 Ch. 501, 505, 507.
(3) (1862) 31 Beav. 14.

Preston K.C. and *H. B. Vaisey* for a residuary legatee. The gift is void and the 3000*l.* falls into residue.

One test of the validity of a charity is whether it is a trust which if necessary the Court can administer: *In re Macduff.* (3) There is here no suggestion as to how mediums are to be trained, and there is no way of the Court knowing whether the training can be carried on properly or not. *In re Cranston* (2) does not suggest that the testator's mere belief that a gift would be for the benefit of the public establishes that fact. The belief must be a rational one, that is, one with which the Court would prima facie agree. Lord Cozens-Hardy M.R. in *In re Wedgwood* (4) said he was content to adopt what was said by FitzGibbon L.J. in *In re Cranston* (2) that: "Any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow creatures (including, under decided cases, animals), and which will confer the supposed benefit without contravening law or morals, will be charitable." There is no evidence here that the gift will confer the supposed benefit.

Bryan Farrer and *Andrewes-Uthwatt*, for other residuary legatees, argued to the same effect.

Cur. adv. vult.

Jan. 26. RUSSELL J. Prima facie the gift is bad as creating a perpetuity, but the defendants claim that the gift is good

(1) [1895] 2 Ch. 501, 505, 507
(2) [1898] 1 I. R. 431, 446.
(3) [1896] 2 Ch. 451, 463, 464.
(4) [1915] 1 Ch. 113, 117.

on the ground that it is a valid charitable bequest. Although the testator has added certain qualifications and directions the gift which is the subject of these proceedings is one for the purpose of "training and developing suitable persons, male and female, as mediums."

The London Spiritualistic Alliance, alive to the fact that it lies with them to satisfy the Court as to the validity of the gift, have filed four affidavits. They are, probably of necessity, vague and lacking in details, and they afford little or no assistance to the Court.

In the absence of evidence all parties relied without objection on definitions contained in dictionaries and other works, and from these I learn that in connection with what is known as spiritualism the primary meaning of the word "medium" is (I am using my own language) an individual who professes to act as an intermediate for communication between the living and the spirits of persons now dead.

Is a gift for the purpose of training and developing such individuals a good charitable gift?

Mr. Hurst claims that it is on three grounds. Firstly he says it is a trust for the advancement of education, being a trust to train persons to pursue a calling which is not unlawful.

Secondly he says it is a trust beneficial to a section of the public—namely, that section which proposes or intends to engage in the calling of a medium.

Thirdly he says it is a trust beneficial to the whole community because its object is to increase the number of trained mediums in the world, and especially those trained for the purpose of diagnosing and healing disease.

His second and third contentions are framed so as to bring the case within the fourth branch of Lord Macnaghten's well-known classification of charitable gifts in *Pemsel's Case.* (1) But no matter under which of the four classes a gift may prima facie fall, it is still, in my opinion, necessary (in order to establish that it is charitable in the legal sense) to show (1.) that the gift will or may be operative for the

(1) [1891] A. C. 531.

public benefit, and (2.) that the trust is one the administration of which the Court itself could if necessary undertake and control.

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To quote what Lord Eldon said in the case of *Morice* v. *Bishop of Durham* (1): "As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust; a trust therefore, which, in case of mal-administration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can neither reform mal-administration, nor direct a due administration."

In the present case the defendants, the London Spiritualistic Alliance, have wholly failed to satisfy me on either point. There is no evidence worthy of the name—nothing but vague expressions of opinions and belief, directed in the main to alleged powers of diagnosis and healing attributed to some mediums.

Even if I were to assume that some of these persons called mediums possess powers of diagnosis or powers of healing, or both (in which event it could scarcely be denied that a gift whose object was to increase their number would be operative for the public benefit), still the gift here is not limited to that purpose. It is a gift which consistently with its terms could be wholly applied in the training and development of mediums other than what for convenience may be termed therapeutic mediums.

I am not satisfied that a gift for that purpose is or may be in any sense of the words operative for the benefit of the public. Further, I am wholly unable to say, upon the evidence, that a trust for either the more limited purpose or the more general purpose is a trust the administration of which the Court could in any way undertake or control. Indeed, so far as one can form an opinion upon the present materials, it would appear to be a trust the administration of which the Court would be quite unable to undertake or control.

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(1) (1805) 10 Ves. 522, 539.

It was contended that the Court was not the tribunal to determine whether a gift or trust was or was not a gift or a trust for the benefit of the public. It was said that the only judge of this was the donor of the gift or the creator of the trust. For this view reliance was placed on the views expressed by the Master of the Rolls and by some members of the Court of Appeal in Ireland in the case of *In re Cranston.* (1) Reliance was also placed on a sentence in the judgment of Chitty J. in *In re Foveaux.* (2)

So far as the views so expressed declare that the personal or private opinion of the judge is immaterial, I agree; but so far as they lay down or suggest that the donor of the gift or the creator of the trust is to determine whether the purpose is beneficial to the public, I respectfully disagree. If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a mild example.

In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it.

The grounds upon which I decide this case render it unnecessary for me to consider another point which was urged before me—namely, that the training of mediums necessarily involves, or tends to involve, illegality, and is therefore illegal, or at all events against public policy. There is much to be said on both sides, and I prefer to express no opinion until it becomes necessary to do so. I hold this gift to be invalid, involving as it does a perpetuity, because it has not been established that the trust is one which is or may be operative for the public benefit, or one which the Court could administer or control.

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(1) [1898] 1 I. R. 431, 446.

(2) [1895] 2 Ch. 501.

There will be a declaration that the bequest is not a valid charitable bequest, that it fails and falls into residue.

The costs of all parties will be taxed and paid out of the testator's estate.

Solicitors: *Cooper, Bake, Roche & Fettes; Stephens & Sons; Waterhouse & Co.; Gedge, Fiske & Gedge.*

J. B. B. M.

ROMER J.
1923
Feb. 1.

In re KING.

KERR *v.* BRADLEY.

[1922. K. 691.]

Charity—Charitable Bequest—Stained-glass Window in Church in Memory of Testatrix and certain Relations—Good charitable Gift—Whole of Residue—Fund more than sufficient—Surplus—Cy-près.

A bequest of residue to provide for the erection of a stained-glass window in a parish church to the memory of the testatrix and certain of her relations is a good charitable gift, and if the residue is more than sufficient to meet the cost of a window of the best possible character, the surplus remaining in the hands of the trustees must be applied cy-près.

By her will, dated June 6, 1919, the testatrix appointed the plaintiffs to be her executors and trustees, and she devised and bequeathed all her real and personal estate unto her trustees upon trust that they should sell, call in and convert the same into money, and should with and out of the moneys produced by such sale, calling in and conversion and with and out of her ready money pay her funeral and testamentary expenses and debts and duties which should become payable at her death, and should apply the residue of such moneys in providing a stained-glass window and placing the same in the church of Irchester to the memory of her late father, her late mother and her late sister and herself.

The testatrix died on May 11, 1920.

After paying all the funeral and testamentary expenses and debts of the testatrix, and all the duties payable at her death, there remained in the hands of the trustees the sum of 1094*l.* 19*s.* 4*d.* The estimated cost of a stained-glass window of the best possible character was between 750*l.* and 800*l.* Under these circumstances the plaintiffs took out this summons raising the following questions: (1.) Whether the gift was a good charitable trust, or whether it failed to any and what extent; (2.) if it should be decided that the gift was a good charitable trust, then whether, in the event of a balance remaining in the hands of the plaintiffs, they were at liberty to apply such balance cy-près in providing a small brass tablet to record the gift, and another or other stained-glass windows, and placing the same in the church at Irchester, or how otherwise they ought to deal with such balance.

F. D. Morton for the plaintiffs.

P. M. Walters for a co-heir at law of the testatrix. This is not a good charitable gift. There is no charitable intention shown in the will. The whole object of the gift was the commemoration of the testatrix and certain of her relations; it was not to benefit the church. A gift to erect a monument in a church is not charitable: *Mellick* v. *President and Guardians of the Asylum.* (1) There is no authority for the proposition that a gift to provide a stained-glass window is charitable. When once a monument is erected in a church it forms part of the fabric, and a bequest to keep it in repair is a good charitable gift. The distinction is between the fabric and something being added to the fabric.

If it is a charitable gift, then I submit the surplus should not be applied cy-près. In every case where the cy-près doctrine was applied, there has been a general charitable intention shown: *In re Wilson.* (2)

[He also referred to *Hoare* v. *Osborne* (3) and *Trimmer* v. *Danby.* (4)]

V. Barran (*H. T. Methold* with him) for the next of kin of the testatrix.

(1) (1821) Jac. 180.
(2) [1913] 1 Ch. 314.
(3) (1866) L. R. 1 Eq. 585.
(4) (1856) 25 L. J. (Ch.) 424.

Dighton Pollock for the Attorney-General. This is undoubtedly a good charitable gift. The surplus should be applied cy-près. This is clearly laid down in Jarman on Wills, 6th ed., pp. 712–13 and p. 718, where he cites *Attorney-General* v. *Drapers' Co.* (1); *Bishop of Hereford* v. *Adams* (2); and *Attorney-General* v. *Earl of Winchelsea.* (3) *Bishop of Hereford* v. *Adams* (2) is a very clear decision. This is quite a different case from that of *In re Packe.* (4) The proposition that the surplus should be applied cy-près finds support in Tyssen's Charitable Bequests, pp. 140–5, 202.

Romer J. In this case I have to determine, in the first place, whether a gift of the residuary estate of the testatrix for the purpose of providing a stained-glass window in memory of herself and certain members of her family, is a good charitable bequest. I have no doubt that it is. It is clear that a bequest to provide a parish church with stained-glass windows is a good charitable gift. But it is said that the gift here is bad because the motive is not to beautify the church or to benefit the parishioners, but to perpetuate the memory of the testatrix and her relations. It was, however, pointed out in *Hoare* v. *Osborne* (5) that in considering whether a bequest is charitable, the motive of the testator in making it is immaterial. In certain cases a gift for the purpose of erecting a tomb in a church has been held not to be a charitable gift, but the distinction between those cases and this is that a gift for erecting a tomb is not so obviously a gift for the benefit of a church as a gift for the provision of a stained-glass window. No decision has been cited covering the case of a stained-glass window, and I hold that the gift is a charitable gift. That being so, the further question arises as to how any surplus is to be disposed of after the cost of providing the stained-glass window, including the cost of obtaining a faculty, has been provided for. On behalf of the next of kin it is said that the surplus is undisposed of. On

(1) (1840) 2 Beav. 508.
(2) (1802) 7 Ves. 324.
(3) (1791) 3 Bro. C. C. 373.
(4) [1918] 1 Ch. 437.
(5) L. R. 1 Eq. 585, 587.

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behalf of the Attorney-General it is contended that any surplus must be applied cy-près. In cases of a gift to a charitable institution, where such institution ceases to exist before the death of the testator the cy-près doctrine does not apply unless a general charitable intention can be found, and it is contended by the next of kin that there is not any difference between such a case and the present case, where a sum is left over after a particular intention has been fulfilled, there being no general charitable intention shown. But in the case of a legacy to a charitable institution that exists at the death of the testator, but ceases to exist after his death and before the legacy is paid over, the legacy is applied cy-près, even in the absence of a general charitable intention: see *In re Slevin.* (1) In Tyssen's Charitable Bequests, 2nd ed., p. 202, I find the following statement: "Where a gift is made for a particular charitable purpose which is sufficiently provided for without the gift, the gift will be applied cy-près," and various authorities are cited in support of this principle. Such authorities and the other authorities cited to me show that the contention of the Attorney-General is well founded, and I therefore hold that the contention on behalf of the next of kin fails, and that the surplus must be applied cy-près. The Attorney-General consenting, this surplus will be applied in the erection of a further stained-glass window or windows in the same church.

Solicitors: *Collyer-Bristow & Co., for Ingram, Berridge, Flude & Frearson, Leicester; C. E. Pullon, for F. J. Bell, Surbiton; Treasury Solicitor.*

(1) [1891] 2 Ch. 236.

P. J. B.

In re WELD (A PERSON OF UNSOUND MIND SO FOUND).

C. A.
1923
Feb. 8.

Lunacy—Practice—Lunatic so found—Percentage—" Clear annual income "—Deductions allowed—Costs of General Management—Rules in Lunacy, 1892, *r.* 126.

By r. 126 of the Rules in Lunacy, 1892, " There shall be paid a percentage at the rate of 4 per cent. per annum on the clear annual income, amounting to 100*l.* and upwards, of every lunatic so found by inquisition, but so that no larger sum shall be payable in any case in any one year than 400*l.*" :—

Held, that in calculating the " clear annual income " of a lunatic so found by inquisition no deduction could be allowed for the legal costs of general management or administration of his estate.

APPEAL by the committees of the estate of Reginald Joseph Weld, a person of unsound mind so found by inquisition, from the decision of the Master in Lunacy fixing the amount of the percentage to be paid on the passing of the committees' ninth account.

The account showed gross receipts 27,679*l.* 3*s.* 3*d.* and payments amounting to 25,000*l.* 7*s.* 8*d.*, there being a balance due from the receiver on March 31, 1922, of 2678*l.* 15*s.* 7*d.*

The lunatic's estate consisted mainly of a life interest in large landed estates, and the question raised related to the costs of applications in lunacy and other legal costs which may generally be described as costs of general current management.

The circumstances under which these costs were incurred and the transactions to which they related were shortly the following :—

Lulworth Castle and Home Farm.—Mr. Charles Weld Blundell held separate leases of the Castle and Home Farm for twenty-one years which expired on September 29, 1919. A claim for dilapidations against the lessee in respect of both holdings on behalf of the lunatic was put forward, and after considerable negotiations the matters in dispute were referred to arbitration.

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	£	s.	d.
The arbitrators under the lease of the Castle by their award dated November 17, 1920, awarded payment by the lessee to the lunatic of	2526	7	6
One-half the party and party costs of the arbitration, which costs amounted to 569*l.* 17*s.* 4*d.*	284	18	8
And the arbitrators under the lease of the Home Farm by their award dated December 1, 1920, awarded payment by the lessee to the lunatic of	261	9	9
Making a total of	£3072	15	11

Difficulties arose in obtaining payment and proceedings were taken under the Arbitration Act, 1889, to obtain an order that the award of November 17, 1920, might be enforced pursuant to s. 12 of the Arbitration Act, 1889, in the same way as a judgment. The result of these proceedings was that ultimately Mr. Charles Weld Blundell paid the whole amount awarded. The party and party costs in the matter of the said arbitrations amounting (with the half-share recovered from the lessee) to 569*l.* 17*s.* 4*d.* were allowed by the Master as a deduction in arriving at the percentage.

Various applications were made on behalf of the committees of the estate to the Master from time to time for his directions and sanction as to the proceedings against Mr. Charles Weld Blundell, and these, together with the costs incurred out of Court over and above the party and party costs, formed part of the costs of general management, and were not allowed as a deduction in arriving at the percentage.

The sums awarded by the arbitrators had been brought into account as income.

Glebe Lands.—The incumbent of East Lulworth being about to put up for sale by public auction certain glebe lands held by him, the committees were advised that it would be for the benefit of the estate at large that such glebe lands should be purchased, and ultimately the glebe lands were purchased, the purchase money being found by the lunatic. The costs of the conveyance to the trustees for the lunatic and of the application to the Master for his sanction and the carrying out of the purchase, formed part of the costs of general management. The glebe lands were conveyed to the trustees for the lunatic as part of his personal estate. It was admitted on behalf of the lunatic that these were capital costs and could not be deducted against income.

Wool Heath.—The Secretary of State for War held a lease of Wool Heath forming part of the Lulworth Castle Estates for a term of twenty-one years expiring in 1919 and the War Department desired to obtain a lease for the period of ninety-nine years from that date; negotiations were entered into and ultimately the committees were advised that under the Weld settlement it was not practicable to grant a lease for ninety-nine years. The costs of obtaining counsel's opinion as to this and of the various applications to the Master in connection with it formed part of the costs of the general management.

Letting of Lulworth Castle.—Various efforts had from time to time been made to let the Castle, and in particular negotiations were entered into with a Mr. Wills and a draft agreement was prepared with him under which he was to make a large expenditure upon the Castle and pay a considerable rent. These negotiations ultimately fell through owing to Mr. Wills withdrawing his offer. The costs of the preparation of the agreement and of the negotiations, and of the various applications to the Master in reference thereto, formed part of the costs of general management. Ultimately, however, Mr. Wills paid the sum of 100*l.* to the estate in respect of the costs, and the receiver of the estate received this 100*l.* and included the amount in his accounts as a deduction from the costs incurred in this matter.

St. Andrews and Sea Vale Farms—Tank Camp.—During the war the War Department took possession of St. Andrews and Sea Vale Farms, part of the Lulworth Castle estates upon the sea-coast in Weymouth Bay, and established a

Tank Camp there. Negotiations were entered into with the War Department in reference thereto, and ultimately an agreement was arrived at with the Secretary of State for War under which the War Department paid a rent of 700*l.* per annum during the period they were in possession of the premises and agreed to pay compensation when the farms were given up. This agreement was submitted to the War Compensation Court and approved by them. The costs of the negotiations with the War Department, the preparation of the agreement, the application to the War Compensation Court and the various applications to the Master were included in the costs of general management.

Leases—Leases at West Lulworth to Sir Alfred D. Fripp.—Two leases of land at West Lulworth were granted to Sir Alfred Downing Fripp, one of Millers Cottage for ninety-nine years at a rent of 18*l.* per annum and the other of land at Britwell Road, West Lulworth, for the term of ninety-nine years at a rent of 15 guineas. These were repairing leases. The costs were partly paid by the lessee, but some costs, particularly those in connection with the application to the Master to grant the leases, were included in the costs of general management.

Lease of Land for Extraction of Oil from Shale.—Some years since an option was granted to the Ethelburga Syndicate and was from time to time renewed to extract oil from shale on the Lulworth Castle Estates, and under this option sums were from time to time paid by the Syndicate to the lunatic amounting to upwards of 2000*l.* which had been treated as income. Ultimately the Syndicate assigned their interest in the option to the National Union Oil Company, to whom with the sanction of the Master a grant was made of the right to extract oil from shale on the Lulworth Castle Estates for fifty years at a royalty and a dead rent of 600*l.* per annum. The costs connected with such option and renewal and in connection with the said lease formed part of the costs of general management.

Lease of the Home Farm.—The costs of an agreement for letting this farm to a Mr. Carter at a rent of 300*l.* per annum and the attendance upon the Master in reference to the grant thereof also formed part of the costs of general management. The same applied also to the granting of agreements of: Burngate Farm at a rent of 300*l.* per annum. Grange Farm at a rent of 600*l.* per annum. Agreement for letting Bindon Mill and Farm to a Mr. Atkin under which the tenant was to carry out improvements to the machinery in the mill which was to be for the benefit of the landlord at the end of the term and the tenant was to pay a rent of 70*l.* per annum. The costs of the above matters formed part of the costs of general management.

Littlemore Camp.—The War Department during the war took possession of a portion of the Lulworth Castle Estates and established a camp called Littlemore Camp and did certain damage thereto, and after considerable negotiations ultimately paid 1000*l.* to the receiver in respect of such damage, and the sum of 1000*l.* was credited in the receiver's accounts. The costs of the negotiations with the War Department in reference to this payment and of the application to the Master in connection therewith formed part of the costs of general management.

In fixing the amount of the lunacy percentage to be paid out of the lunatic's estate under r. 126 of the Rules in Lunacy, 1892, on the occasion of the passing of the committees' ninth account the Master directed that the taxed costs of general management in respect of the matters above stated should not be deducted from the receipts in the account in arriving at the amount upon which the lunacy percentage should be paid.

The committees and receiver appealed from the Master's order to the judge. The application came before Younger L.J. in chambers on December 12, 1922, who adjourned it to January 16, 1923, with a direction that a notice of the application should be given to the Treasury Solicitor in order that he might have an opportunity of attending and arguing the point if so advised. The application was subsequently adjourned into Court to be heard by the Lords Justices.

The question turned on the meaning or effect of the words "clear annual income" in r. 126 of the Rules in Lunacy, 1892, which provides: "There shall be paid a percentage at the rate of 4 per cent. per annum on the clear annual income, amounting to 100*l.* and upwards, of every lunatic so found by inquisition, but so that no larger sum shall be payable in any case in any one year than 400*l.*"

The appeal was heard on Feb. 8, 1923.

J. H. Stamp for the appellants. The Master was wrong in disallowing the deduction of the legal costs of general management in assessing the amount of the lunacy percentage. In managing an estate there are, it is submitted, two classes of expenses—namely, (1.) the costs of getting in the income and (2.) the costs of disposing of it. Normally two-thirds of the total costs are incurred as to (1.) and one-third as to (2.).

It is submitted that the current charges of management are deductible from the gross income. What you have to ascertain is the clear annual income of the lunatic. It is submitted that the words "clear annual income" in r. 126 mean the income which remains after discharging all liabilities incurred by the recipient in acquiring it, not being liabilities properly chargeable against capital. You must look partly at the position of the recipient and not solely at the purpose for which the money is expended, and where the recipient is only a tenant for life some expenses would properly form a deduction from income which in the case of an absolute owner would more properly be charged against capital—e.g., costs in relation to the grant of a long lease. There is not much authority on the meaning of the words "clear income." The meaning of the words "clear annual value" has been considered in connection with the old qualification of a county voter where in one case an annual sum of 1*l.* 6*s.* for collecting rents and the average annual expenses of repairs were treated as deductions, the test applied being that the land must be worth enough to enable the landlord to spend the qualifying sum: *Hamilton* v. *Bass.* (1) In *Lady Bateman* v. *Faber* (2)

(1) (1852) 22 L. J. (C. P.) 29; 12 C. B. 631.

(2) (1899) 81 L. T. 675, 677; on appeal (1900) 83 L. T. 7.

the meaning of the words "an income in her own right of 8000*l.* or more per annum" came under discussion in connection with a shifting clause which was to operate upon the plaintiff succeeding to such an income, and in that case the principle was thus stated by Kekewich J.: "On the other hand, I do think you must ascertain as fairly as you can what is coming to the plaintiff from the particular property which you have to consider in the way of income coming to her, something which will not merely pass through her banking account, but will pass through her banking account for her own benefit, exclusive of whether the estate has not been generously treated, but has had all fair charges against it made." That, it is submitted, is the right test to apply here, namely, "what is the lunatic's spending income." This is not an income tax point and the strict technical rules as to income tax deductions do not apply. The practice of the Lunacy Office of refusing to allow a deduction of the costs of general management gives only a partial effect to the word "clear" in the rule. It is submitted that the words "clear income" in the rule mean the same thing as they were held to mean in *Lady Bateman* v. *Faber* (1) and that no other test can be logically justified. There are two cases which have some bearing on the subject—namely, *In re Marquis of Lothian* (2), in which Buckley L.J. allowed a receiver's remuneration to be deducted in arriving at the clear annual income, and *In re Alston* (3), in which the Lords Justices in advising the Lords Commissioners of the Treasury expressed the opinion that remuneration to a committee for his services ought not to be deducted from income before assessing percentage.

Sir Douglas Hogg A.-G. and *Dighton Pollock* for the Crown. The earliest reference to percentage is contained in 3 & 4 Will. 4, c. 36, s. 8, which refers to a fund to be raised for payment of salaries and expenses by a percentage on the "clear annual incomes" of lunatics. For the provisions of this Act other lunacy procedure was substituted by the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70). By

(1) 81 L. T. 675.
(2) Unreported. Jan. 24, 1913.
(3) Unreported. July 27, 1917.

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s. 26 of that Act it was provided that "A percentage on the respective clear annual incomes of all lunatics shall be paid" according to the several rates set out in the section. That Act was wholly repealed by the Lunacy Act, 1890 (53 Vict. c. 5), which by s. 148 provides that: "The Lord Chancellor, with the concurrence of the Treasury, may make rules fixing the percentage and fees payable in proceedings relating to lunatics and their estates, and regulating the mode in which the same are to be ascertained and paid." It was under that power that the present rule (r. 126) was made, and in making it the language which had hitherto been used was adopted. It must be assumed that the Lord Chancellor at that time was cognisant of the practice which had prevailed in the Lunacy Office for the last sixty years of refusing to allow as a deduction costs of general management in assessing the percentage. It is fair to assume that it was intended that the language of the rule should be construed as it had for so long been construed. The actual items allowed are set out in the Yearly Practice of the Supreme Court, 1923, p. 2400, where the practice of the Lunacy Office is stated in the following terms: "In arriving at the clear annual income the following deductions should be made: (1.) Interest in respect of any charge on the property. (2.) Annuities and annual sums for which the lunatic is liable. (3.) Commission and salaries to agents for managing the lunatic's roperty. (4.) Rents, rates, taxes, insurance and repairs to the lunatic's property, as distinguished from such outgoings in relation to the house in which he lives. (5.) Bank charges. (6.) Premiums on committee's or receiver's bond. (7.) Costs of account. (8.) Remuneration of receiver where he definitely performs the duties of a land agent. (9.) Premiums on lunatic's life policy only if given by way of collateral security." It is not perhaps very easy logically to justify all these deductions, and little help is to be obtained from decided cases. It is submitted that "clear annual income" in r. 126 means income after payment of the charges upon it—namely, mortgage interest and annuities. Costs of general management are costs incurred in earning the income and ought not to be deducted. The principle contended for on behalf of the appellant, if allowed, would involve a prolonged and expensive dissection of the accounts and would render the rule unworkable. It is submitted that practice which has hitherto been so long adopted ought to be followed. The Crown is willing as a concession to allow the deduction of the costs in connection with the Lulworth Castle and Home Farm arbitrations beyond the party and party costs recovered from the tenant and also the costs of the negotiations with the War Department in respect of the damage done at the Littlemore Camp.

J. H. Stamp in reply. The rules of practice adopted by the Lunacy Office are mere rules of thumb unsupported by principle and in fact have been varied as the result of decision—e.g., *In re Marquis of Lothian.* (1) The duty of the Court is to construe r. 126 and to give effect to its meaning notwithstanding the rule of thumb practice which has been adopted by the Office.

LORD STERNDALE M.R. I do not see my way to grant the present application except so far as the Attorney-General has agreed to extend as a concession—I say nothing more than that—the concession that has already been made as to the costs of the arbitration in regard to the Lulworth Castle and Home Farm arbitrations to the solicitor and client costs which are not at present included in it, and also to similar costs and expenses in respect of the matter with regard to the Littlemore Camp, that is to say, the obtaining of the 1000*l.* compensation from the War Office. I think it is perfectly obvious, and I do not think Mr. Stamp contends to the contrary, that the two large items of 648*l.* odd, and 769*l.* odd, could not possibly be allowed as they stand. The whole bill of costs would have to be dissected. I think from what has been said that it is quite clear that a considerable proportion of the items included in those large sums could not possibly be allowed as deductions from income, and a great many of them, I think, probably are incurred, not from the necessity

(1) Unreported.

of earning income, but from the unfortunate position of the tenant for life of these estates being a person of unsound mind. They are expenses that arose, and that have to be paid out of his income, because of that unfortunate position; matters such as applications to the Court, and so on. We are asked to lay down a principle. I find it impossible to lay down any principle which would be of any use to anybody. The principle suggested by Mr. Stamp, which on the face of it has a good deal to recommend it, is one which would involve long, difficult, and expensive investigation of all the charges of the description which he mentioned in order to see under what category each particular item fell. I doubt very much whether by the time that expense had been incurred, except in very exceptional cases, the lunatic's estate would be in any way benefited, and any rule which has been suggested to us, except that by the Attorney-General, which I may call a rule of thumb, would involve that prolonged and expensive investigation. I think there is a good deal of force in the argument that the present rule which was made, adopting an expression that had been employed for a great many years, was made with knowledge, on the part of the maker of the rule, of the practice that had obtained with regard to the ascertainment of clear annual income. I cannot impute ignorance to the Lord Chancellor of all the affairs of the lunatics with which he is the person who, in the ultimate event, is charged. There is a good deal of force in that argument, but I think it is enough to say that the rule, perhaps a rough and ready rule, perhaps a rule of thumb, which has been applied by the Master in this case, is one that is not unfair, and works, on the whole, as well as any rule that could be laid down. If that is to be altered it probably would necessitate the making of a new rule altogether. Probably the Lord Chancellor would have to revise the existing rules, that is, make a new rule as to the payment of the percentage, and rules as to the ascertainment of clear annual income which would, in all probability, in the end, work out no better than the present rough and ready rule that is applied. Therefore I think there is no ground for interference with the

Master's decision in this case. In my opinion it was quite a fair case to bring before the Court, and I do not think there ought to be any costs of this appeal.

WARRINGTON L.J. I am of the same opinion. The rule by which the percentage is now regulated is r. 126 of the Rules in Lunacy, 1892, that there should be paid a percentage at the rate of 4 per cent. per annum on the clear annual income. That rule embodies a principle which was originally enacted in the statute of 3 & 4 Will. 4, c. 36, s. 8, where the same expression "clear annual income" is used.

The appellants ask us to direct that there shall be allowed as a deduction from income for percentage purposes solicitors' costs incurred in the management of the estate, or, at least, so much of those costs as may be costs incurred in acquiring the income; "acquiring" was the expression used by Mr. Stamp, and, on another occasion, "earning the income"; it does not matter which expression you use. The practice in the Lunacy Office which has prevailed for a great many years, long before the rule of 1892 was made, has been not to allow such solicitors' charges incurred in the management of the lunatic's estate, and to make no distinction between the charges incurred in acquiring or earning the income, and the other charges. If we were to accede to the views put forward on his clients' behalf by Mr. Stamp the result would be that every solicitor's bill would have to be elaborately dissected in order to ascertain what charges came within those which it is said ought to be allowed, and what charges did not. I think if we were to accede to that demand we should probably throw a great deal more expense upon the lunatic's estate than would be represented by the amount of deduction in the percentage which would result from it.

On the whole, I do not think we can say that the solicitors' costs relating to the management of the estate can be allowed in arriving at the percentage, but with reference to two matters, the Lulworth Castle and Home Park arbitrations and the Littlemore Camp, the Attorney-General agrees that the concession made in the one case as regards party and

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party costs ought to be extended to the solicitor and client costs, and in the other case, that the costs incurred in obtaining the compensation from the Government may, as a special case, be allowed. On that, I think we ought to dismiss the appeal, but without costs.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Eland, Nettleship & Butt.*
Solicitor for Crown: *The Treasury Solicitor.*

W. I. C.

Dicta of RUSSELL, J., at p. 262, *applied.* *Re* HOPKINSON (*decd.*). [1949] 1 All E.R. 346.

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[1922. T. 468.]

Charitable Bequest—Discretion of Trustees—"Patriotic purposes or objects"—Validity.

A testator by his will directed his trustees to apply one-fifth of his residuary estate "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire" as they in their absolute discretion should select:—

Held, by Russell J. and the Court of Appeal, that the words of the gift must be read disjunctively and that, as under its terms the trustees could apply the trust property for purposes not necessarily charitable, the trust was void, and did not cease to be void because the patriotic purposes or objects were confined to those within the British Empire.

ORIGINATING SUMMONS.

Henry Greenwood Tetley, by his will dated January 30, 1920, after appointing the National Provincial and Union Bank of England, Ld., and his wife Charlotte Tetley to be executors and general trustees thereof and making numerous devises and bequests, gave the residue of his estate to his trustees upon trust to sell and convert and to stand possessed of the proceeds upon trust as to one-fifth thereof "to devote and apply the same for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper," and as to three-fifths thereof upon trusts for the benefit of his children and their issue as therein mentioned.

The testator died on August 21, 1921, and his will was duly proved by the executors therein named.

This was an originating summons taken out by the National Provincial and Union Bank of England, Ld., for the determination (inter alia) of the question whether the gift for "patriotic purposes or objects" was a good charitable gift.

The defendants to the summons were the testator's widow, the beneficiaries under the will, and the Attorney-General. (1)

The summons came on for hearing before Russell J. on Oct. 19, 1922.

Ashworth James for the plaintiffs.

Dighton Pollock for the Attorney-General. The gift is good, whether it be read disjunctively or conjunctively. "Patriotic" is defined in the Century Dictionary as: "Full of patriotism, actuated by love of country; directed to the public safety or welfare." A patriotic purpose or object is therefore charitable, because it comes within the fourth class of charities as defined by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2)—namely, a trust for a purpose beneficial to the community not falling under the head of a trust for the relief of poverty, or the advancement of education or religion. The words "in the British Empire"

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(1) There was also a summons taken out by the bank as trustees of a settlement dated January 22, 1920, and made by the testator mainly for the benefit of his daughter C. M. Tetley, which contained a trust for "patriotic purposes and objects" in terms identical with those contained in the will. The two summonses were heard together but, as the question as to the invalidity of such a trust was the same in both, this report is confined to the summons taken out under the will.

(2) [1891] A. C. 531, 583.

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are equivalent to "for the benefit of the British Empire." They apply to the whole gift, which is valid also on the ground that it is a gift for the benefit of a locality: *Dolan* v. *Macdermot.* (1)

A gift to the Government for the benefit of the public is a good charitable gift: *Nightingale* v. *Goulbourn* (2); so too is a gift to assist emigration to particular colonies: *Barclay* v. *Maskelyne.* (3) Patriotic charity is the idea running through the whole of this gift.

If the gift is read conjunctively it is a gift for purposes, objects, and institutions which are both patriotic and charitable. In that case the gift is good even if a patriotic purpose or object alone is not charitable. Thus gifts for charitable and benevolent purposes: *Jemmitt* v. *Verril* (4); charitable and deserving objects: *In re Sutton* (5); or for charitable and benevolent institutions: *In re Best* (6); or for "objects of charity, or any other public objects": *In re Bennett* (7), have been held good. Just as in the case of *In re Scowcroft* (8) a gift of a building "to be maintained for the furtherance of Conservative principles and religious and mental improvement" was held to be a good charitable gift on the ground that it was a gift for the furtherance of Conservative principles and religious and mental improvement in combination, so here the gift is for patriotic and charitable purposes and objects in combination.

Courthope Wilson K.C. and *Gavin T. Simonds* for children and grandchildren of the testator. On the plain construction of the terms of this gift the trustees may select an object that is not charitable. The gift must be read disjunctively, and so read the trustees may choose patriotic purposes, or patriotic objects, or charitable institutions, or charitable objects.

It is impossible to say that every patriotic purpose or object is charitable and therefore the gift is bad: *Houston*

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(1) (1867) L. R. 5 Eq. 60; (1868) L. R. 3 Ch. 676.
(2) (1848) 2 Ph. 594.
(3) (1858) 4 Jur. (N. S.) 1294.
(4) (1826) Amb. 585n.
(5) (1885) 28 Ch. D. 464.
(6) [1904] 2 Ch. 354.
(7) [1920] 1 Ch. 305.
(8) [1898] 2 Ch. 638.

v. *Burns* (1); *Blair* v. *Duncan* (2); *Langham* v. *Peterson*. (3) Even if this is a gift for the benefit of the British Empire it would still be void for vagueness or uncertainty. Lord Romilly's dictum, in *Dolan* v. *Macdermot* (4), that a gift for such public purposes as the trustees should select ceased to be void for vagueness or uncertainty if the public purpose were for the benefit of a specified parish was stated to be incorrect in *Houston* v. *Burns*. (1)

Preston K.C. and *Sir Arthur Underhill* for other children of the testator argued to the same effect.

C. J. Mathew K.C. and *Beebee* for testator's widow declined to argue against the validity of the gift.

Sir J. W. Greig K.C. and *C. A. Bennett*, *G. B. Hurst K.C.* and *C. J. Farwell*, and *J. E. Harman* for other parties.

Cur. adv. vult.

Nov. 9. RUSSELL J. The question in this case is whether the disposition of one-fifth of the testator's residuary estate contained in his will is valid or not.

The disposition is as follows: "Upon trust as to one-fifth thereof to devote and apply the same for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper." Would the trustees be at liberty under the words of the gift to select a purpose or object not charitable? If yes the gift is bad; if no the gift is good.

The first thing to do is to construe the gift and ascertain what choices are given to the trustees. The Attorney-General contended before me that the clause should be read conjunctively, and that so read the trustees in selecting any purpose, object or institution were confined to selecting such as were both patriotic and charitable, or at all events that every object selected by them must be charitable. I am

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(1) [1918] A. C. 337.
(2) [1902] A. C. 37.
(3) (1903) 87 L. T. 744.
(4) L. R. 3 Ch. 676.

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unable so to read the gift. The repetition of the word "such" and the reference both to patriotic objects and to charitable objects makes such a reading in my opinion impossible. The testator has by this clause, according to its natural and grammatical interpretation, given to the trustees a fourfold choice in the exercise of which he authorizes them to devote the funds to any one or more of the following—namely, "patriotic purposes," "patriotic objects," "charitable institutions," and "charitable objects." It will be observed that the testator himself refers to "patriotic objects" and "charitable objects" as distinct objects for the application of the share. Is a patriotic purpose or a patriotic object charitable? If the answer is to be yes, it can only be because they fall within the fourth of the divisions enumerated by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), as being purposes beneficial to the community not falling under any of the three previous divisions—namely, relief of poverty, advancement of education, and advancement of religion. That a patriotic purpose or a patriotic object may fall within this fourth division I have no doubt. Thus to apply the fund in aid of the public revenue would be a patriotic application and also a charitable application, being one beneficial to the community: see, for instance, *Nightingale* v. *Goulbourn.* (2) But must every application of the fund for a patriotic purpose be beneficial to the community and therefore charitable? It seems to me that it is impossible to hold that. What is or is not patriotic is in many cases mere matter of opinion. Subsidising a newspaper for the promotion of particular political or fiscal opinions would be a patriotic purpose in the eyes of those who considered that the triumph of those opinions would be beneficial to the community. It would not be an application of funds for a charitable purpose. As Lord Parker said in *Bowman* v. *Secular Society* (3): "a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift." To assist the Prime Minister for the time being by paying his income tax, or easing him from any other liability might well be deemed patriotic, but hardly charitable. Other instances need not be given. It is sufficient to say that the Court would have no means of judging, in many cases, whether the particular purpose or object selected by the trustees as a patriotic purpose or a patriotic object, was or was not beneficial to the community and therefore charitable. It could not effectively control the trustees in the administration of the trust.

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(1) [1891] A. C. 531, 583.
(2) 2 Ph. 594.
(3) [1917] A. C. 406, 442.

In my opinion under the gift now in review it would be open to the trustees to apply the trust property for purposes some of which are and some are not charitable, and that the trust is accordingly void.

There is no case that I know of in the books where the meaning and effect of a gift for patriotic purposes is discussed. But it is worthy of observation that in the two cases where there existed a suggestion of a purpose which might be called patriotic, the Court upheld the gifts as being, in the one case, a gift for the advancement of education, and in the other, a gift for the advancement of religion. I refer to the cases of *Smith* v. *Kerr* (1) and *In re Pardoe*. (2)

The Attorney-General further argued that the words " in the British Empire " applied to the whole gift, that they were equivalent to " for the benefit of the British Empire," and that accordingly the gift being one for the benefit of a locality was a valid gift. For this he relied on *Dolan* v. *Macdermot*. (3) It is not clear that the words " in the British Empire " do apply to more than charitable institutions and objects ; but assuming they do, and assuming that I am correct in the conclusion which I have come to—namely, that the gift must be read disjunctively—this point

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(1) [1902] 1 Ch. 774.
(2) [1906] 2 Ch. 184.
(3) L. R. 5 Eq. 60, 62.

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would appear to be covered by the decision of the House of Lords in the case of *Houston* v. *Burns* (1), in which Lord Romilly's dictum in *Dolan* v. *Macdermot* (2) is stated to be incorrect. Whether the decision in *Dolan* v. *Macdermot* (2) is to be treated as overruled by *Houston* v. *Burns* (1) may be doubted. Eve J. in the case of *In re Bennett* (3) thought it was not and followed it in the particular case before him, where the gift was read conjunctively; but he pointed out that *Houston* v. *Burns* (1) would apply where the gift was read (as here) disjunctively.

For these reasons I decide that the gift of one-fifth of the testator's residuary estate is invalid. J. B. B. M.

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The Attorney-General appealed. The respondents to the appeal were the plaintiffs, the widow and next of kin of the testator, who were some of the defendants in the action. The interests of the remaining defendants were not affected.

The appeal was heard on February 9, 12, 13, 1923.

Tomlin K.C. and *Dighton Pollock* for the Attorney-General repeated substantially the arguments used on the two points argued in the Court below and referred to the following additional authorities: *Mitford* v. *Reynolds* (4); *Newland* v. *Attorney-General* (5); *In re Macduff* (6); *In re Stephens* (7); *In re Pyne* (8); *In re Wedgwood* (9); and the definition of "patriotic" in the "Century," "Webster," "Imperial," and "Standard" Dictionaries. They further argued that assuming they were wrong on their first points the trustees could apportion the fund between charitable objects and non-charitable objects, and that in default of such apportionment the Court would divide the fund between the charitable and non-charitable objects equally: *Hunter* v. *Attorney-General*. (10)

(1) [1918] A. C. 337.
(2) L. R. 5 Eq. 60, 62.
(3) [1920] 1 Ch. 305.
(4) (1841) 1 Ph. 185.
(5) (1809) 3 Mer. 684.
(6) [1896] 2 Ch. 451.
(7) (1892) 8 Times L. R. 792.
(8) [1903] 1 Ch. 83.
(9) [1915] 1 Ch. 113.
(10) [1899] A. C. 309, 324.

Beebee for the testator's widow and *Mumford* for one of the daughters of the testator took no part in the argument.

Courthope Wilson K.C. and *Gavin T. Simonds* for another daughter of the testator repeated the arguments adduced by them in the Court below, and in addition to the cases then cited by them referred to *In re Nottage* (1); *Kendall* v. *Granger* (2); *In re Davis* (3); and to Theobald on Wills, 7th ed., pp. 350, 358, 364.

[YOUNGER L.J. referred to *In re Davidson* (4) and *In re Garrard.* (5)]

As regards the last point made for the appellant the doctrine of apportionment does not apply as between charitable and indefinite gifts. There must be charitable objects on the one hand and definite and ascertainable non-charitable objects on the other: *In re Douglas.* (6) The cases on apportionment are collected in Theobald on Wills, 7th ed., p. 370; see also Jarman on Wills, 6th ed., p. 232.

Ashworth James for the trustees of the will.

Tomlin K.C. in reply referred to *Attorney-General* v. *Lord Lonsdale* (7) and *Attorney-General* v. *Webster.* (8)

LORD STERNDALE M.R. This is an appeal from a decision of Russell J., which, but for the necessity of referring to particular instances, need not have taken long to argue; but, as it depends upon particular instances, we have had cited to us, naturally and necessarily, a number of such instances. The question is whether certain words in a will are of such a nature as by themselves to constitute a good charitable gift. The words are: "to devote and apply the same for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select." I am very sorry that the question has arisen.

(1) [1895] 2 Ch. 649.
(2) (1842) 5 Beav. 300.
(3) Ante, p. 225.
(4) [1909] 1 Ch. 567.
(5) [1907] 1 Ch. 382.
(6) (1887) 35 Ch. D. 472, 485.
(7) (1827) 1 Sim. 105.
(8) (1875) L. R. 20 Eq. 483.

Some of the beneficiaries, or some of those who will benefit if this gift be held not to be a good charitable gift, are anxious that what were undoubtedly the intentions of the testator should be carried out. Others, or at any rate one other, are anxious to have the matter disposed of according to the strict law, and consequently we have to dispose of it according to the strict law. The learned judge has held that the gift is not a good charitable gift. He disposed, apparently during the argument, of the only point in the case which has given me any trouble at all, i.e. what is to be taken as the definition, and the effect of that definition, in this will of the word "patriotic." He held that the definition did not exclude objects and purposes which might not be charitable in the strict legal sense of the word, but we have not the advantage of his reasoning upon the matter, because he did not further allude to it in his judgment. As I have said, I, at any rate, am unable to find any principle which will guide one easily, and safely, through the tangle of the cases as to what is and what is not a charitable gift. If it is possible I hope sincerely that at some time or other a principle will be laid down. The whole subject is in an artificial atmosphere altogether. A large number of gifts are held to be charitable which would not be called charitable in the ordinary acceptation of the term, and when one takes gifts which have been held to be charitable, and compares them with gifts which have been held not to be charitable, it is very difficult to see what the principle is on which the distinction rests. I confess I find considerable difficulty in understanding the exact reason why a gift for the benefit of animals, and for the prevention of cruelty to animals generally, should be a good charitable gift, while a gift for philanthropic purposes, which, I take it, is for the benefit of mankind generally, should be bad as a charitable gift. The gift for the benefit of animals, apparently, is held to be valid because it is educative of mankind, it being good for mankind that they should be taught not to be cruel but kind to animals, and one would quite agree with that. But if the benefit of mankind on that particular side makes that a good charitable gift it is a little difficult to see why any philanthropic purpose to benefit mankind on all sides is a bad one. But it is so; it has been so decided, and therefore the present case is made very difficult, as every case is where there is no governing principle which can be applied.

When the case was first opened, I hope I did not do Mr. Tomlin an injustice, but I took his argument upon the meaning of the word "patriotic" to be this: "Patriotic" means for the benefit of the country, and what is for the benefit of the country is charitable, and similarly in his reply: "Patriotic purposes" means something for the protection and welfare of the State, and what is for the benefit of the State is charitable. Of course if that proposition can be established he is right, but it must go as far as this, I think, that the meaning of the word "patriotic" is such that it excludes from "patriotic purpose," or "patriotic object," every purpose, and every object, which is not charitable in the legal sense of the word. Unless it goes as far as that it does not seem to me to go far enough. That argument is, in a great measure, founded upon the important and often quoted passage from the judgment of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), and it is said that "patriotic" having that meaning, it falls within what Lord Macnaghten there describes as the fourth class, which is this: "trusts for other purposes beneficial to the community, not falling under any of the preceding heads." I will assume that "patriotic" has the meaning of "for the benefit of the State." I am not at all sure that, used as it is in this will, and used in the sense in which ordinary persons understand the word, it necessarily is confined to things which are, in truth and in fact, necessarily for the benefit of the State. I am by no means clear that in ordinary language that is the meaning of the word "patriotic." But I will assume that it is, and then it comes, as I say, within Lord Macnaghten's fourth class of "trusts for purposes beneficial to the community," because there does not appear to me to be very

(1) [1891] A. C. 531, 583.

much difference between "for the benefit of the State" and "beneficial to the community." In *In re Macduff* (1) it was distinctly held, as far as I can see, by, at any rate, two members of the Court, Lindley and Rigby L.JJ., that it was wrong to turn the statement of Lord Macnaghten that charitable trusts must be "trusts for purposes beneficial to the community" round in this way and to say that trusts for purposes beneficial to the community must be charitable trusts. That is expressly repudiated by those two learned judges, and therefore it seems to me, upon that decision, it is impossible for us to say that even giving to the words "patriotic" or "patriotic purposes or objects" the meaning which the appellants wish us to do they necessarily exclude objects which are not technically charitable, although they are patriotic within that meaning of the word. It is true that those learned judges, after quoting Lord Macnaghten's description, afterwards go on to use as equivalent words "purposes of general use, or of general utility to the community." They are not the same words, but it does seem to me that they were considered the same, in effect, by the learned judges who delivered that judgment, and basing myself mainly, if not entirely, upon that judgment, I am of opinion that the word "patriotic" cannot be confined, as the appellants would wish to confine it, to a purpose which excludes anything which is not charitable. That is the first point, and, as I have said, it is the only point that has occasioned me any difficulty.

The next point is that the collocation of the words in the will is such that "patriotic purposes or objects and such charitable institution or institutions or charitable object or objects" must be read together, so that the word "charitable" is coupled with "patriotic" in this way—that it must be imputed to patriotic that it is also charitable. In my opinion that is not right, and I do not think that I can put my reasons for thinking it is not right better than by reading Russell J.'s words, with which I agree. He said: "The Attorney-General contended before me that the clause

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(1) [1896] 2 Ch. 451.

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should be read conjunctively, and that so read the trustees in selecting any purpose, object or institution were confined to selecting such as were both patriotic and charitable, or at all events that every object selected by them must be charitable. I am unable so to read the gift. The repetition of the word 'such' and the reference both to patriotic objects and to charitable objects makes such a reading in my opinion impossible. The testator has by this clause, according to its natural and grammatical interpretation, given to the trustees a fourfold choice in the exercise of which he authorises them to devote the funds to any one or more of the following—namely, 'patriotic purposes,' 'patriotic objects,' 'charitable institutions,' and 'charitable objects.'" I agree with that as the proper construction of the words, and I think that second point also fails.

Then the third and last resort was that, at any rate, assuming patriotic purposes and objects to be outside the definition of charity, and therefore bad in law, the fund can be divided between patriotic objects which are not charitable, and patriotic objects which are charitable. I do not see how that can be done. There is no distribution at all between the different objects. The trustees are to apply the fund either to one or to the other, or to one and the other in quite undefined proportions, and it is therefore open to them, on the wording of the will, to apply the whole of the fund to purposes which are not charitable, and have nothing left for charity, and, in those circumstances, it seems to me an apportionment such as is suggested, whether in equal or in other proportions, is impossible. I think that the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion, and I wish to say that it is with great reluctance that I have come to the conclusion I have, because one is always sorry when the Court is compelled to hold void a gift made by a testator.

The question here is whether the direction to the trustees to devote and apply one-fifth of the proceeds of the testator's residuary estate "for such patriotic purposes or objects and

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such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper" is a good charitable bequest. I think there can be no doubt about this, that the real question is whether the word "patriotic" has such a limited meaning that it excludes every object or purpose which is not "charitable" within the legal definition of that term. If it does not do so, but includes objects which are not charitable within the legal definition, then the gift for patriotic objects and purposes would not be a good gift, but would be void for uncertainty. That that is the real question I think appears from the cases in which similar difficulties have arisen by reason of the use of the word "benevolent," or "philanthropic," also words of general application, words which it might be said exclude anything which is not charitable, but which the Courts have held have not that narrow meaning. The question is well put with reference to the word "benevolent" by Sir William Grant in *James* v. *Allen.* (1) He says: "The question is, what authority would this Court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute." Now substitute there the word "patriotic" for the word "benevolent," and that passage exactly expresses the problem which we have to solve. Is the word "patriotic," therefore, so narrow in its meaning as to exclude all purposes not strictly charitable? What is said is that in order to be a patriotic object or purpose, the object or purpose must be one beneficial to the community, that is to say, to the nation, or patria, to which the person who uses it belongs. And then it is further said that objects beneficial to the community are necessarily within the technical definition or denomination of "charitable purposes," and therefore patriotic purposes are charitable.

(1) (1817) 3 Mer. 17, 19.

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But, in the first place, I do not think it is correct to say that the expression "patriotic purposes or objects" is confined to objects or purposes which are beneficial to the State. "Patriotic" has a wide meaning, which depends very much upon the state of mind and the motive of the person who uses it. But I will assume for the moment that the word "patriotic" does exclude objects that are not beneficial to the community, and that it is synonymous with a description of objects which are so beneficial. Are those objects necessarily charitable? Great reliance has been placed upon Lord Macnaghten's statement as to the meaning in a legal sense of "charitable" in the case already referred to of *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (1) He there says: "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." It has sometimes been contended that those last words mean that trusts for all objects beneficial to the community are for that reason alone charitable. But that contention has never succeeded, and the fallacy of it has been, in terms, pointed out, I think, by all three judges in *In re Macduff* (2), but in the clearest terms by two of them, that is to say, by Lindley and Rigby L.JJ. Lindley L.J., after referring to a statement of Sir Samuel Romilly in *Morice* v. *Bishop of Durham* (3), similar to that of Lord Macnaghten in *Pemsel's Case* (1), says: "Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean, to say that every object of public general utility must necessarily be a charity. Some may be, and some may not be." Then passing over a passage which is immaterial for this purpose he goes on to say: "Now, what Lord Macnaghten said (1) is obviously a paraphrase of the words of Sir Samuel Romilly which I have just read: 'Charity in its legal sense comprises four principal divisions:

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(1) [1891] A. C. 531, 583.

(2) [1896] 2 Ch. 451, 466.

(3) (1805) 10 Ves. 522, 532.

trusts for the relief of poverty: trusts for the advancement of education: trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads,' leaving out those somewhat significant words of Sir Samuel Romilly as to the fourth head, 'which is the most difficult,' which shewed perfectly plainly that Sir Samuel Romilly saw, and I do not doubt that Lord Macnaghten saw also, that there might be some purposes of public general utility which might be charitable and some which might not." Then Rigby L.J. says (1): "I have only now to deal with the supposed difficulty arising from the judgment of Lord Macnaghten, and I think it is altogether illogical to ascribe to Lord Macnaghten what is ascribed. He says cases of charity may be divided into four classes, and one of them is, 'trusts for purposes beneficial to the community.' You inquire what the divisions of charities are, and you come to the conclusion that there is one miscellaneous set of charities which can be classed under that head; but to deduce from that the notion that every purpose of general use to the community must be a charity is just about as logical as to draw from a statement in the report of an insurance society that 'persons insured with us may be divided into men, women and children' the deduction that every man, every woman, and every child is insured in that society." It seems to me, therefore, that it is open to us to say, and we must say, that merely because a trust may be said to be for the general use of or for some purpose beneficial to the community it is not necessarily confined to "charitable purposes" in the legal acceptation of that term. I think it is quite clear, therefore, that the expression "patriotic purposes," even if it be confined to purposes beneficial to the State, is not necessarily confined to charitable purposes, and that a gift for "patriotic purposes" is therefore so uncertain as to be void.

Then Mr. Tomlin puts forward a second contention which is that in the collocation of the words here used the testator has sufficiently shown that by "patriotic" he means objects which are both patriotic and charitable, because he has used the conjunctive "and," and not the disjunctive "or" after the words "patriotic purposes," and before the words "such charitable institution or institutions." With reference to that, I am quite satisfied with the answer which was given by Russell J., and which has already been stated by the Master of the Rolls, and I do not think I can express my view better than Russell J. expressed it.

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(1) [1896] 2 Ch. 451, 473.

Then with regard to his last contention—namely, that this is a case in which the Court might apportion the fund between those purposes which are charitable and those which are not charitable, I think the answer already given by the Master of the Rolls is conclusive. As I read this gift, the trustees might, if they were so minded, under the trusts conferred upon them, apply the whole of this fund to what the testator describes as "patriotic objects," and apply none to those objects which are described as "charitable," and if that is so, then there is no room for any apportionment. If the testator had divided it between, or made it compulsory on the trustees to divide it between, "patriotic purposes" on the one side and "charitable purposes" on the other, then the mere fact that it was impossible to fix the apportionment might not stand in the way of the Court doing it itself. But this is not one of those cases. In my opinion that contention also fails. The result is that the appeal must be dismissed.

YOUNGER L.J. The question arising upon this will is, in my judgment, that stated by Lord Langdale in *Kendall* v. *Granger* (1): "Whether the trustees are bound to apply the fund wholly to a charitable purpose, for, to make it valid, it must, according to the decisions, be obligatory upon them. It is not a question whether the trustees may apply it to a charitable purpose, but whether, by the words of the will, they are bound to do so. The decisions go to this further extent, that they must have no option between a charitable and any other purpose." Mr. Tomlin, I think, rather

(1) 5 Beav. 300, 302.

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demurred to the aptness of any statement of the question before us couched in these, or any similar terms. But it seems to me that only in some such form of words is the whole problem adequately set forth. Reduced, however, to the terms of this particular case, the issue turns upon the answer to the further question: What, in this will, is the connotation of the expression "patriotic purposes or objects" in the residuary gift? Now whether the word "and" which immediately follows be read as it is conjunctively or be treated as the equivalent of the disjunctive "or," it is, I think, clear that the word "charitable" cannot be brought over from the succeeding phrase "charitable institutions" so as to be included in the description of "patriotic purposes or objects." Unless, therefore, the quality of charity is, in the legal sense, necessarily introduced by the word "patriotic" itself, so that the phrase "patriotic purposes or objects" really means, and is the equivalent of, "charitable purposes or objects, patriotic in character," that quality cannot, in my judgment, be regarded as connoted by the word to the necessary extent that the appellant requires. And ultimately the only way in which Mr. Tomlin did suggest that the equivalent of the word "charitable" was included in the term "patriotic" was to say that the word "patriotic" in this will really meant something for the protection and welfare of the State, and that a gift for any purposes or objects so characterized was a good charitable gift. Now, I doubt, myself, whether the word here can be so construed. The element of protection is certainly, I think, not necessarily denoted by the term "patriotic" as that word is used in this will. Assuming, however, that Mr. Tomlin's definition may, in substance, be accepted, the authorities, and in particular *In re Macduff* (1) in this Court, seem to me very clearly to show that even if you define the words "patriotic purposes" as being "purposes beneficial to the community," or as being purposes described by what is, in substance, an analogous phrase, such purposes, while they may be charitable, need not all necessarily be so. The

(1) [1896] 2 Ch. 451.

phrase "patriotic purposes" would, therefore, not satisfy Lord Langdale's test. Nor do I think that *Nightingale* v. *Goulbourn* (1), when examined, really supports the opposite view. The bequest there, upheld as a good charitable gift, was a gift of residue "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country Great Britain." I cannot think that the use by a testator of the bare word "patriotic" would necessarily be regarded as a fair equivalent of these impressive words even apart from their context. I cannot myself, however, escape from the impression that, whether consciously or not, the fact that the gift was in that case made to the holder of the office of Chancellor of the Exchequer for the time being led the Court to conclude that the way in which the public was necessarily to be benefited as a result of the gift made the gift unobjectionable. Whether such a consideration would now be held relevant may be doubted, in view of such a case as *In re Davidson* (2), but whether so or not, there is no analogous circumstance in this testator's will upon which the appellant, the Attorney-General, can here place any reliance. But while, even on Mr. Tomlin's view, the words used here are not, in my judgment, sufficient to create a charitable gift or trust, I doubt, myself, whether in another respect his is the entire meaning of the words "patriotic purposes" as used in this will. My inclination —I may say my strong inclination—is to agree with Mr. Simonds that the purposes which the testator had in mind in penning this will clearly enough included purposes the motive only of which, rather than their direct result, was patriotic in character, and this, I think, was the view of the learned judge, judging from the examples foreign to the idea of charity which he gave as being included in his acceptation of the word. If so, few, indeed, of these purposes need be charitable.

Nor is there, I think, any room here for an apportionment of any part of the fund to strictly charitable institutions or

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(1) 2 Ph. 594.

(2) [1909] 1 Ch. 567.

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objects, leaving only an ultimate residue to be undisposed of by the will. That result is, I think, not possible on this will. In Sir John Leach's words, in *Vezey* v. *Jamson* (1), in the passage quoted by Lord Davey in his judgment in *Hunter* v. *Attorney-General* (2), the testator here "has not fixed upon any part of this property a trust for a charitable use, and I cannot, therefore, devote any part of it to charity." The whole gift, accordingly, in my opinion is void.

Appeal dismissed.

Solicitors: *Pearce & Sons; Treasury Solicitor; Patersons, Snow & Co., for Holmes & Hills, Bocking; Fowler, Legg & Young.*

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LISSER AND ROSENKRANZ'S CLAIM.

[0012 of 1921.]

Company—Winding Up—Contract to deliver Foreign Currency—Breach of Contract—Damages—Rate of Exchange—Date for Conversion into English Currency—Proof in Winding Up—Tender by Liquidator to Creditor in full — Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 214, *sub-s.* 1 (*a*) (*i*).

A bank in England (hereinafter called the bank) contracted with the applicants (a German bank) to deliver to the applicants on December 31, 1920, specific amounts of American dollars and English pounds sterling against the delivery to the bank of specific amounts of Swiss francs and German marks. The applicants performed their part of the contract, but the bank failed to deliver either the dollars or the sterling. On January 6, 1921, the bank suspended payment, and on January 25, 1921, a compulsory winding-up order was made and a liquidator was appointed. The applicants in the meantime—namely, on January 15, 1921 (to put themselves in a position to fulfil their obligations to customers and to minimize their loss), purchased—as it was not disputed they were entitled to do—the American dollars and English sterling against the bank and paid therefor German marks at the market price ruling on that day. On May 19, 1921, the applicants at the invitation of the liquidator lodged their proof for a sum of English pounds sterling which represented the German marks converted into English currency at the rate of exchange ruling on January 25, 1921, the date of the winding-up order. In December, 1921, the liquidator, in pursuance of s. 214 of the Companies (Consolidation) Act, 1908, purchased the same number of marks as the applicants had expended in acquiring the undelivered currencies, and on January 5, 1922, in spite of the applicants' proof, tendered that sum of marks to the applicants in full satisfaction of their claim, which tender was refused. Owing to the rapid depreciation of the mark from and after January, 1921, the value of the marks converted into English currency at the date of the purchase and tender by the liquidator as compared with their value on December 31, 1920, was approximately in the ratio of 5000*l.* to 20,000*l.* Upon the application of the applicants that the liquidator be directed to admit their proof:—

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(1) (1822) 1 S. & S. 69, 71.

(2) [1899] A. C. 309, 323.

Held, by P. O. Lawrence J. and the Court of Appeal, that the claim was for damages for breach of contract to deliver American dollars and English sterling and not for a debt in German marks, and that on the authority of *In re British American Continental Bank, Goldzieher and Penso's Claim* [1922] 2 Ch. 575, the applicants were entitled to be admitted as creditors in the winding up for the value of the marks in English sterling at the rate of exchange ruling on December 31, 1920, the date of the breach, and were not bound to accept the tender of the marks made on January 5, 1922.

This summons was taken out in the winding up of the above-named bank (hereinafter called the bank) by the applicants—a German firm carrying on the business of bankers at Hamburg—to have it determined whether they were entitled to be admitted as creditors in the winding up of the bank for any and what amount in respect of damages which they had sustained by reason of the bank's breach of contract.

At some time before December 31, 1920, the applicants had contracted to sell to the bank 200,000 Swiss francs for delivery on December 31, 1920, against payment on that day of 9039*l.* 11*s.* 7*d.* sterling, and the bank had contracted to sell to the applicants, also for delivery on December 31, 1920, (*a*) 30,000 American dollars against payment on that day of 2,047,500 German marks and (*b*) 20,000 American dollars against payment on that day of 5747*l.* 2*s.* 6*d.* sterling.

The result of these transactions was that on December 31, 1920, the applicants had to deliver to the bank 200,000 Swiss francs and 2,047,500 German marks and the bank had to deliver to the applicants 50,000 American dollars and

3292*l.* 9*s.* 1*d.* sterling (being the difference between the 9039*l.* 11*s.* 7*d.* payable by the bank for the 200,000 Swiss francs and the 5747*l.* 2*s.* 6*d.* payable by the applicants for the 20,000 American dollars).

On December 31, 1920, the applicants in performance of their part of the contract delivered to the bank the 200,000 Swiss francs and the 2,047,500 German marks. (1)

The bank on the other hand entirely failed to carry out its part of the contract; it neither delivered the 50,000 American dollars nor the 3292*l.* 9*s.* 1*d.* sterling.

On January 6, 1921, the bank suspended payment, and on January 25, 1921, the usual compulsory order to wind up the bank was made on the petition of a creditor.

In the meantime, on January 15, 1921, the applicants, in order to fulfil their obligations to their own customers and to minimize their loss, had purchased 50,000 American dollars and 3292*l.* 9*s.* 1*d.* sterling against the bank, paying therefor 4,339,919 German marks, which represented the market price ruling on that day.

On April 15, 1921, the liquidator wrote a letter to the applicants stating that a first dividend was intended to be declared, that the applicants had not yet proved their debt, and that, if they did not do so by May 15, 1921, they would be excluded from that dividend. On May 15, 1921, the liquidator, in reply to a letter received by him from the applicants, wrote informing the applicants that it would be quite in order if their claim were to reach him before May 21.

On or about May 19, 1921, the applicants lodged their proof in the winding up. In this proof the applicants claimed that the bank was indebted to them in the sum of 20,138*l.* 16*s.* 9*d.* for a balance in account as shown by the accounts annexed to the proof. The proof contained a statement that it was lodged without prejudice to the applicants' claim in certain proceedings then pending for the recovery of the 200,000 Swiss francs and that in the event of those proceedings proving successful the applicants were prepared to reduce their claim by the amount recovered.

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(1) By an oversight on the part of the applicants the 200,000 Swiss francs were delivered at the wrong place, but this irregularity eventually proved to be immaterial, and it was not disputed that the applicants duly performed the whole of their part of the contract.

Annexed to the proof was a statement of account in which the applicants had debited the bank with the 4,339,919 German marks which the applicants had paid for the American and English currency as above mentioned. The sum of 20,138*l.* 16*s.* 9*d.* for which the applicants claimed to prove represented the 4,339,919 German marks converted into English money at the rate of exchange ruling on January 25, 1921, the date of the winding-up order.

The proceedings mentioned in the proof were proceedings which the applicants had taken in Switzerland to assert a lien on the 200,000 Swiss francs in respect of the unpaid purchase money.

On July 8, 1921, the liquidator wrote a letter to the applicants referring to their proof and informing them that a question had arisen as to the rate of exchange to be applied, which question had been referred to the Court for decision. The liquidator added that the rate of exchange would appear to lie between two dates, namely January 6, 1921, when the bank suspended payment, and January 25, 1921, the date of the winding-up order, and that, pending the decision of the Court, he had been able to make a distribution of 5*s.* in the pound to those creditors whose claims had been admitted and suggested that the applicants should allow their claim to be converted into sterling at the mean rate ruling on January 6, 1921 (the rate most unfavourable to the applicants), in which case he would then be in a position to immediately distribute to the applicants the sum equivalent to 5*s.* in the pound thereon. He also added that if the Court should decide that January 25, 1921, was the material date he would allow the applicants to make an additional proof for any difference which might arise in their claim as the result thereof and that, if the applicants were willing to adopt his suggestion, he would convert the applicants' claim at the mean rate ruling on January 6, 1921, and would make the necessary application to the Board of Trade for a cheque covering the amount of

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the first dividend of 5*s.* in the pound payable thereon, which would then be transmitted to the applicants.

On July 13, 1921, the applicants wrote to the liquidator agreeing to accept 5*s.* in the pound at the rate of exchange ruling on January 6, 1921, and stating that they had taken note that, if the Court decided that the conversion should take place on January 25, 1921, an additional proof might be made.

On July 25, 1921, the liquidator wrote to the applicants that he was dealing with their proof in the manner suggested, but regretted that he could not remit the amount of the dividend, as the question of ownership of the 200,000 Swiss francs had not yet been determined by the Court, and, in the event of the Court deciding that these francs should be paid over to the applicants, they would have to give the bank credit for the sterling equivalent thereof.

The German mark having considerably depreciated after the month of January, 1921, the liquidator on October 14, 1921, wrote to the applicants stating that, subject to the approval of the Court, the committee of inspection were prepared to authorize him to pay the applicants' claim in German currency without interest provided the applicants withdrew any claim they were still maintaining against the 200,000 Swiss francs. In reply to this letter the applicants wrote that they were not prepared to accept the proposal therein contained.

The German mark having still further depreciated the liquidator on December 20, 1921, made an ex parte application to the Registrar and obtained his leave to purchase out of the bank's assets such an amount of German marks as would be sufficient to pay to the applicants 4,339,919 German marks, with interest thereon at the rate of 5 per cent. per annum from January 15, 1921, to the date of payment, and to pay the same to the applicants in satisfaction of their claim. In his affidavit in support of that application the liquidator stated (inter alia) that he could purchase the requisite German marks for about 5425*l.*, and that as he had already paid dividends in the liquidation amounting to 6*s.* 3*d.* in the pound and was about to pay another 1*s.* 3*d.* in the pound, it was clearly much to the advantage of the English creditors to redeem the Swiss francs without fighting the question of any attachment orders being right.

Shortly after obtaining this leave the liquidator purchased 4,542,052 German marks (being 4,339,919 marks for principal and 202,133 marks for interest), and on January 5, 1922, caused these marks to be tendered to the applicants in Hamburg in full satisfaction of their claim against the bank. This tender was refused by the applicants.

In the meantime the Court of first instance in Switzerland had decided that the applicants had no lien upon or interest in the 200,000 Swiss francs, and the applicants had lodged an appeal against this decision. Later on, however, the applicants abandoned their appeal, and thereupon on January 10, 1922, their solicitors wrote a letter to the liquidator in which (after referring to the fact that on the abandonment of the appeal the decision of the Court of first instance had become finally binding upon the parties) they stated that they would be glad to know whether the liquidator was prepared to pay to the applicants the first and second dividends which he had declared, and if so they requested him to pay the same to the applicants.

On January 18, 1922, the liquidator wrote a long letter in reply. In this letter the liquidator recapitulated the facts and the effect of the correspondence and stated (inter alia) that he could not admit the applicants' contention that their claim had been admitted to rank for dividend and that, as the amount of the claim had been tendered in full, no question of proof could arise. In conclusion he stated that he was not prepared to deal with the applicants' claim as suggested in the letter under reply, but was quite prepared to pay over to the applicants the 4,542,052 German marks, and that in his view no claim could arise as payment in full with interest had been offered by order of the Court.

The applicants thereupon, on February 27, 1922, issued the present summons, asking for a declaration that they were entitled to prove for the sum of 20,138*l.* 16*s.* 9*d.*, and that the liquidator be directed to admit the proof and to pay to

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the applicants the dividends already declared and any further dividends that might be declared pari passu with the unsecured creditors of the bank, and that the costs of the applicants be paid by the liquidator out of the assets of the bank.

The summons came on for hearing before P. O. Lawrence J. on November 14, 1922.

Tomlin K.C. and *Gavin T. Simonds* for the applicants. The applicants are entitled to damages for breach of the contract to deliver the American dollars and English pounds sterling. They were acting within their rights when they purchased in the market those foreign currencies with German marks. They are entitled to prove in the winding up for 20,133*l.* 16*s.* 7*d.*, the value of those marks so expended converted into English currency at the rate of exchange ruling at the date of the breach—that is, December 31, 1920. The case is covered by the decision in *Goldzieher and Penso's Claim.* (1)

Schiller K.C. and *Malcolm Hilbery* for the liquidator. The right of the applicants to purchase the foreign currencies against the bank in consequence of the non-delivery thereof by them under their contract is not disputed. The damages resulting from the breach consisted in the expenditure of German marks and, consequently, the damages are fixed in marks. The nominal value of the mark is a constant value, and the liquidator was entitled to satisfy the damages from the breach of the contract to deliver the foreign currencies at any time after the breach before judgment by paying the creditors in the currency of the country where the contract ought to have been performed—that is, in marks. The liquidator having tendered to the applicants the precise number of marks expended by them has done all that he was bound to do. The contract was of a special nature; it was not so much a contract to deliver foreign currencies as it was one to establish credit for the applicants in America and England to the extent of the respective currencies contracted

(1) [1922] 2 Ch. 575.

to be delivered. This case falls nearly within the principle of *Société des Hotels du Touquet-Paris-Plage* v. *Cumming* (1), where the claim was satisfied by payment of the debt, after it fell due and action brought to recover it, in the currency of the country where the contract was to be performed. There is a difference between a breach of contract to deliver a commodity and a contract to deliver foreign currency: in the latter case the remedy is the recovery of a debt. In the present case the damages are fixed in marks, and constitute a debt. This case does not fall within *Di Ferdinando* v. *Simon, Smits & Co.* (2), or *S.S. Celia* v. *S.S. Volturno.* (3) In *Di Ferdinando* v. *Simon, Smits & Co.* (2) the claim was not for a debt, but for damages for non-delivery of goods in Italy on a date certain, and it was decided that the conversion of the amount of damages into English currency must be made as at the date of the breach, because the contract in that case was a contract made in sterling and the damages to which the plaintiff was entitled were damages always computable in sterling.

The present case is more like *Kirsch & Co.* v. *Allen, Harding & Co.* (4), which was a case of a dollar contract, where the damages were fixed in dollars, and therefore the claim was for damages computable in dollars, and the conversion was calculated at the rate of exchange prevailing at the date of the judgment. The liquidator was entitled, instead of admitting the proof in the winding up, at any time subsequent to the breach but before judgment to tender the marks in full. The question as to the date when the rate of exchange ought to be fixed for the purpose of conversion of foreign into English currency, is a question only of procedure, and only arises in a case of proof being admitted in the English winding up.

Cur. adv. vult.

1922. Nov. 28. P. O. Lawrence J. read the following judgment: This summons has been taken out by the

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(1) [1921] 3 K. B. 459; [1922] 1 K. B. 451.
(2) [1920] 2 K. B. 704; [1920] 3 K. B. 409.
(3) [1921] 2 A. C. 544.
(4) (1919) 25 Com. Cas. 63.

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applicants to have it determined whether they are entitled to be admitted as creditors in the winding up of this bank for any and what amount in respect of damages which they have sustained by reason of the bank's breach of contract. [His Lordship then stated the facts as above set forth and continued :]

In my opinion the question raised by this summons is completely covered by my decision in *In re British American Continental Bank, Goldzieher and Penso's Claim* (1), which was affirmed by the Court of Appeal. According to that decision, the Court, in a case like the present, has to determine the amount of the damages sustained at the date of the breach of the contract, and, as those damages have in the first instance to be assessed in foreign currency, the correct date on which they ought to be converted into English money for the purpose of ascertaining the amount due at the date of the winding-up order is the date of the breach. In my judgment the applicants were not bound to accept the tender of German marks made by the bank on January 5, 1922, as the marks then tendered did not represent the full amount of the damages for which I think the applicants are entitled to be admitted as creditors in the winding up. Moreover the bank had not contracted to pay German marks to the applicants, and the bank cannot, in my opinion, properly be said to have become indebted to the applicants in any sum of German marks. Even if the applicants' claim had been for a debt and not for damages it follows from my decision in *In re British American Continental Bank, Credit General Liegeois' Claim* (2), that the bank could not have compelled the applicants to accept payment of the debt in German marks after the bank had made default in payment on the due date and after the applicants had asserted their claim in the winding up. The case of the *Société des Hotels, etc.* v. *Cumming* (3) only decided that where the foreign creditor had accepted payment of his debt in the currency of his country before judgment had been pronounced in an action brought by him in England for the recovery of the debt such payment amounted to accord and satisfaction and afforded a good defence to the action.

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(1) [1922] 2 Ch. 575. (2) [1922] 2 Ch. 589. (3) [1922] 1 K. B. 451.

The sole reason why the question of conversion of German marks into English money becomes relevant in the present case is that the applicants are resident and carry on business in Germany and the Court has, therefore, in the first instance to assess the damages in German currency. The purchase by the applicants of the American and English currency against the bank happens in the present case to have fixed the amount of these damages, as it is not suggested that the applicants were not entitled in the circumstances to purchase the American and English currency against the bank or that the applicants ought to have purchased such currency at an earlier date than January 15, 1921, or that the price which the applicants paid in German marks was other than the market price ruling on the day of purchase. This fact, however, does not operate to create the relationship of debtor and creditor between the bank and the applicants in respect of the German marks, nor does it entitle the applicants to sue the bank in England for the recovery of the German marks as a debt. Their claim against the bank still remains a claim for damages for breach of contract.

The argument advanced on behalf of the liquidator that, because in Germany the nominal value of the mark has remained constant, therefore the bank was entitled at any time before judgment to satisfy the applicants' claim by paying the precise amount of German marks expended by the applicants in purchasing the American and English currency appears to me to be based on a fallacy. The rate of exchange in countries outside Germany must necessarily affect the applicants. As the applicants, in the ordinary course of their business, deal largely in the currency of countries outside Germany, the purchasing power of the mark in those countries is a matter of serious concern to them. The effect of holding that the applicants were obliged to accept payment on January 5, 1922, of the precise number of marks which they had expended on January 15, 1921, notwithstanding the fact that in the meantime the mark had seriously depreciated both in America and in England, would be to deprive the applicants of a very substantial part of the damages to which, in my opinion, they are entitled, and to inflict on them a far heavier loss than they will have to suffer in any event by reason of the bank's failure. Moreover, if the principle contended for were the true principle to be applied in a case like the present it would seem to me to follow that, had there been no winding up, and had the value of the mark appreciated instead of depreciating, the applicants would have been entitled to the English equivalent of the marks at the date of the judgment. Such a result seems to me to be in direct conflict not only with the decision in *Goldzieher and Penso's Claim* (1) but also with the decisions in *Di Ferdinando* v. *Simon* (2), and in *S.S. Celia* v. *S.S. Volturno*. (3) Again, supposing the applicants had not purchased the American and English currency against the bank, the English Court would in that case have had to assess the damages at such a sum of German currency as the applicants would have had to pay in Hamburg for the American and English currency according to the market price ruling on the day of the breach, and would then have had to convert that sum into English money at the rate of exchange ruling on that day. In such a case there would, in my opinion, have been no room for the contention that the applicants would have been obliged to accept a tender of German marks in satisfaction of their claim. The only difference which in my opinion the actual purchase of the American and English currency in the present case makes, is that it obviates the necessity of leading evidence to show what it would have cost in Hamburg to purchase the currency. Such purchase cannot in my opinion affect the principle upon which the English Court will assess the damage.

Mr. Schiller made some point as to the special nature of the contract in the present case. He contended that the contract was not a contract to deliver the American and English currency to the applicants in Hamburg, but was in substance and in fact a contract to establish a credit for the benefit of the

(1) [1922] 2 Ch. 575.
(2) [1920] 2 K. B. 704; [1920] 3 K. B. 409.
(3) [1921] 2 A. C. 544.

applicants in America and England respectively to the extent of the American and English currency agreed to be delivered. The only record of the contract which I have seen is silent as to the place of delivery of the American and English currency, but assuming that according to the ordinary course of dealing between the parties the 50,000 American dollars were to be delivered to the applicants' correspondents in New York and the sum of 3292*l.* 9*s.* 1*d.* was to be paid to the applicants' correspondents in London, I entirely fail to see how that helps the liquidator's contention. If the assumption be correct, the facts in the present case would be exactly similar to the facts in *Goldzieher and Penso's Claim* (1), where the French and German currency was under the contracts to be delivered to the claimants (who were a Belgian banking firm) or to their correspondents in the countries in which the credits were to be established, and yet it was held that the claimants were entitled to such a sum in English money as represented the Belgian francs which they had expended in purchasing the French and German currency converted according to the rate of exchange ruling on the day of the breach. In *Goldzieher and Penso's Claim* (1) no such point as the one I am now considering was made by Mr. Schiller, which is not to be wondered at as the Belgian franc had appreciated in value since the claimants in that case had made the purchase. But quite apart from the decision in *Goldzieher and Penso's Claim* (1) I confess that I cannot understand why, on the assumption that Mr. Schiller is correct in his contention as to the special nature of the contract, the bank should on that ground be held entitled to satisfy the applicants' claim for damages by a payment on January 5, 1922, of the amount of German marks which, as a result of the bank's failure, the applicants had to expend on January 15, 1921. The obvious answer to such a contention, apart from all other considerations, in my opinion is that what the Court has to ascertain in the present case is the amount due to the applicants on January 25, 1921, the date of the winding-up order, just as if the Court were sitting on that day and were then trying an action for damages for

(1) [1922] 2 Ch. 575.

breach of contract. No tender after that date (which is equivalent to the date of the judgment in an action), unless possibly it were a tender of the full amount of the sum in sterling eventually found to be due on that date, has in my opinion any bearing either upon the right of the applicants to be admitted as creditors in the winding up for the amount which was due to them on that date or upon the ascertainment of that amount.

Another point made by Mr. Schiller was that the present case fell within the principle of the decision in the case of *Kirsch & Co.* v. *Allen, Harding & Co.* (1), and not within the principles of the decisions in the case of *Di Ferdinando* v. *Simon* (2) and *S.S. Celia* v. *S.S. Volturno.* (3) Even if that were so, the only result in the present case would be that the correct date for the conversion of the German marks into English money would be January 25, 1921 (the date of the winding-up order), instead of December 31, 1920 (the date of the breach), and, as there was an appreciation in the value of the mark between those two dates, the applicants would be entitled to be admitted as creditors in the winding up for a larger sum than the sum for which I consider they ought to be admitted. But in my opinion the true answer to this contention is that the decision in *Kirsch & Co.* v. *Allen, Harding & Co.* (1) is inconsistent with and cannot stand in the face of the later decisions. Mr. Schiller has endeavoured to reconcile it with the later decisions on the ground that the defendants in *Kirsch & Co.'s Case* (1) had contracted to pay American dollars for the goods which the plaintiffs there had contracted to deliver, whereas in *Di Ferdinando* v. *Simon* (2) the plaintiffs were suing for damages for the non-delivery of goods which the defendant had agreed to carry and deliver to the plaintiffs in Italy in consideration of the payment by the plaintiffs of a sum of pounds sterling.

In my opinion, notwithstanding this distinction, the same principle is applicable to both cases. In each case there had been a breach of contract, in one case the breach consisted

(1) 25 Com. Cas. 63.

(2) [1920] 2 K. B. 704; [1920] 3 K. B. 409.

(3) [1921] 2 A. C. 544.

of the non-establishment of the required credits, and in the other case the breach consisted of the non-delivery of the goods. In each case the plaintiff had become entitled to damages for breach of contract, which damages he sought to recover in the English Courts. In each case the plaintiff was a foreign trader and, therefore, the Court had in the first instance to assess the damages in the currency of a foreign country. In my opinion the duty of the Court in each case was to assess the damages as on the day of the breach, in the first instance in the currency of the foreign country, and then, for the purposes of the judgment, to convert that foreign currency into English money at the rate of exchange ruling on the day of the breach. It seems to me to be wholly immaterial for this purpose to consider in what currency the consideration for the contract was payable.

It is, however, unnecessary for me to pursue this question any further because (except for the tender which I have held not to have affected the rights of the applicants) the present case is indistinguishable from *Goldzieher and Penso's Claim* (1), which is binding upon me.

For these reasons I hold that the applicants are entitled to be admitted as creditors in the winding up for such an amount as represents the 4,339,919 German marks converted into English money at the rate of exchange ruling on December 31, 1920, and to receive the dividends already declared and hereafter to be declared on that amount.

As the applicants have substantially succeeded I direct the liquidator to pay their taxed costs of this application out of the assets. The liquidator will have his costs of the summons as part of his liquidation expenses.

H. C. H.

C. A.

The liquidator appealed. The appeal was heard on February 13, 1923.

Schiller K.C. and *Malcolm Hilbery* for the appellant repeated the arguments used by them in the Court below.

Tomlin K.C. and *Gavin T. Simonds* for the respondents were not called upon to argue.

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(1) [1922] 2 Ch. 575.

Lord Sterndale M.R. I think this judgment is quite right. The matter arises in the liquidation of the British American Continental Bank, Ld., which is the same bank as that in respect of which *Goldzieher and Penso's Claim* (1) arose. It arises on a contract in these terms: "In accordance with our forward contracts you have to deliver to us Frs. 200,000—Zurich, on the 31st instant, and we would be obliged if you will pay the amount in question to the Union de Banques Suisses, Zurich, for the credit of our account with them on the 31st instant. We in our turn have credited you on current account with 9039*l.* 11*s.* 7*d.* value 31st instant. Furthermore we have to deliver to you $50,000.—TT New York on the 31st instant, and would be obliged in view of the intervening holidays if you would let us have your instructions for the disposal of same at your earliest convenience. Against the above dollars you will have credited us with mks. 2,047,500—value 31st inst. (equivalent of $30,000) and we have debited you on current account with 5,747*l.* 2*s.* 6*d.* value 31st instant (equivalent of $20,000)."

The bank unfortunately got into difficulties and went into liquidation and was not able to deliver either the dollars or the sterling which they had agreed to deliver. The claimants, Messrs. Lisser and Rosenkranz, bought sterling and dollars against the bank in consequence of the failure of the latter to deliver, and the amount that they paid was, after giving credit for certain matters for which the bank were entitled to credit, some 4,300,000 marks odd. They then put in a proof for 20,138*l.* 16*s.* 9*d.*, which represented the value of the 4,330,000 marks at the rate of exchange at that date. It is true that the claimants went on and called it "Balance in account, 20,000*l.*," but I do not think it was in the ordinary sense a balance in account. It may be called "Balance in account" because after claiming damages on one side and giving credit for other things on the other side, that was what remained; in that sense it was a balance in account and in no other. The claim really was in respect of damages for breach of contract to deliver what the bank had agreed to deliver. Correspondence, with which I need not trouble, passed between the parties, with the result that some year or two afterwards the liquidator of the bank obtained the leave of the Court to invest some of the assets in the purchase of a quantity of marks sufficient to pay this 4,300,000 marks odd and interest, and he then tendered to the claimants that amount of marks in full discharge of their debt. That number of marks at the time when he bought them for that purpose amounted to some 5000*l.* odd instead of some 20,000*l.* odd, and of course it was very much to the benefit of the other creditors that the liquidator should carry that transaction through. The claimants not unnaturally refused to accept the marks.

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(1) [1922] 2 Ch. 575.

I think that the learned judge was right in saying that this case is governed by *Goldzieher and Penso's Claim.* (1) I cannot distinguish that case from the present. I think it is quite a fallacy to say that there was any debt of this 4,330,000 marks in the sense of being an ordinary debt as distinguished from the ascertainment of damages for breach of contract. What the effect might be if it were a debt I do not propose to discuss. It seems to me that the learned judge was quite right when he said that "The purchase by the applicants of the American and English currency against the Bank happens in the present case to have fixed the amount of these damages." That is what it did and that is all it did. Suppose they had not bought against the bank but had done nothing and had come now and said: "Measure these damages which we have sustained by breach of contract," there is no doubt whatever on the authorities that the amount would have to be ascertained, if there were any question of conversion of marks into sterling, at the date of the breach. That would be the position then and it seems to me to be the position now. They had fixed the amount of damages by the transaction which took place in Germany, and according to the case to which I have referred, a decision of the Court of Appeal, and according I think also to the decision of the House of Lords on these same points, the date at which

(1) [1922] 2 Ch. 575.

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the amount is to be ascertained is the date of the breach. Therefore the date at which the German currency which they have expended in order to cover their loss has to be converted into British sterling is also the date of the breach. I think the reasons and the conclusions of P. O. Lawrence J.'s judgment are both right, and it is not necessary to say any more about the case except that I agree with the judgment and think that the appeal should be dismissed with costs.

Warrington L.J. I am of the same opinion. Once you arrive at the fact, which seems to me to be abundantly established, that the claim here is a claim for damages for breach of contract and that the claim is not for the recovery of a debt, it seems to me that the case is perfectly clear. All that the creditors did, or rather all that the claimants did, was to ascertain the amount of their damages by actually buying the dollars and the sterling in Germany. They need not have done that; they might have made a claim for the loss they had sustained by not having their dollars and sterling. Probably the amount would have been the same, but that does not matter. All that the purchase of marks effected was to fix the amount of the loss which the breach of the contract had caused, and, accordingly, this being a claim for damages for breach of contract, the matter falls, I think, within the decision of the Court of Appeal in *Goldzieher and Penso's Claim* (1) in the winding up of the same company, and the learned judge was quite correct in fixing the date of the breach—that is to say December 31, 1920—as the date as at which the claim in marks ought to be converted into English currency.

Younger L.J. I am of the same opinion.

Solicitors for applicants: *Rehder & Higgs.*
Solicitors for respondent: *Henry Hilbery & Son.*

W. I. C.

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(1) [1922] 2 Ch. 575.

In re KEMNAL AND STILL'S CONTRACT.

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1923
Jan. 31;
Feb. 1;
March 5.

[1922. K. 677.]

Vendor and Purchaser—Administration—Executor—Power to concur in Partition—Land Transfer Act, 1897 (60 *&* 61 *Vict. c.* 65), *s.* 2, *sub-ss.* 2, 3—*Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 53), *s.* 21, *sub-s.* 2.

An executor of a testator who dies seised as tenant in common of an undivided share in real estate has power to concur with the co-owners of the other undivided shares therein in a deed of partition of the real estate, the exercise of such a power being a proper and reasonable step towards the beneficial realization of the assets of his testator.

A purchaser of the land taken in severalty by any one of the parties to such a deed of partition acquires a good title to the land purchased by him in the absence of notice of any impropriety in the transaction on the part of the executor.

Decision of P. O. Lawrence J. reversed.

VENDOR AND PURCHASER SUMMONS.

By an agreement in writing dated May 4, 1922, the vendor agreed to sell and the purchaser agreed to purchase at the price of 3250*l.* (amongst other hereditaments) four plots of freehold land, coloured green on the plan thereto, and hereinafter called the green land.

By an indenture of conveyance on sale dated July 29, 1907, lands, which included the green land, were conveyed for value to the use of W. G. Fenn and F. R. Docking in fee simple as tenants in common. By a memorandum under their hands of the same date they acknowledged that the purchase money had been paid by them and W. Hooker in equal shares, and that they (Fenn and Docking) were seised of the land conveyed to them by the said indenture as tenants in common but in trust for themselves and Hooker in equal shares.

Fenn by his will, dated August 26, 1912, appointed the same persons to be both executors and trustees thereof, and after certain specific and pecuniary bequests devised and bequeathed his real and residuary personal estate to his trustees upon trust for sale and after payment of his debts expenses and legacies to invest the residue and to stand possessed thereof upon trust to pay a certain annuity; and

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then, subject to that annuity, the testator made certain bequests of the income of his residuary estate during the life of his wife to her and his children, and on the death of his wife the testator directed that, after setting aside a fund to answer the said annuity, his trustees should hold his residuary estate in trust in equal shares for all his children living at the death of the survivor of himself and his wife. The will contained no express powers of partition or purchase or exchange, but contained a power of postponement of sale.

Fenn died on November 11, 1913, and his will was proved by all the executors on January 31, 1914.

By a deed of partition dated May 2, 1914, and made between Fenn's executors of the first part Docking of the second part Hooker of the third part and T. R. Eldridge of the fourth part, after reciting that the lands in the first schedule thereto were part of the lands comprised in the conveyance of July 29, 1907, and that they had from time to time been offered for sale, and after reciting the will of Fenn appointing the same persons both executors and trustees and that the parties thereto had agreed to make a partition of the lands comprised in the first schedule thereto, Fenn's executors as personal representatives and Docking conveyed and Hooker confirmed to Eldridge and his heirs the lands in the first schedule thereto To hold the same unto Eldridge and his heirs as to the land in the first part of that schedule to the use of Fenn's executors in fee simple as joint tenants as personal representatives of Fenn, as to the land in the second part of the schedule (which included the green land) to the use of Docking in fee simple, and as to the land in the third part of the schedule to the use of Hooker in fee simple.

Objection was taken by the purchaser to the title to the green land shown by the vendor who derived title from Docking on the ground that the execution of the deed of partition of May 2, 1914, by Fenn's executors was not within their powers as executors.

This summons was taken out by the purchaser for a declaration that a good title to the land sold had not been shown by the vendor.

It was admitted that at the date of the deed of partition of May 2, 1914, Fenn's executors were not functi officio as executors.

The summons was heard before P. O. Lawrence J. on November 16, 1922.

J. Bradley Dyne for the purchaser. Fenn's executors had no power to join in the partition of the estate, although there is no decision either for or against an executor possessing such a power. The effect of the Land Transfer Act, 1897, s. 2, sub-ss. 2 and 3, is only to raise the question whether before that Act an executor had power to partition leaseholds. The Act gave him no additional power; and if he had no power to partition leaseholds neither had he the power to partition real estate. An executor has certain powers to enable him to perform his duties as executor in clearing the estate and, as was pointed out by Jessel M.R. in *Oceanic Steam Navigation Co.* v. *Sutherberry* (1), he may even have a power to lease, if that be the best way of administering the assets. But, even if a partition would be permissible on such conditions, a vendor is not entitled to throw upon a purchaser the onus of having to judge whether a partition was the best way of administering the assets The Trustee Act, 1893, s. 21, does not enable an executor to join in a partition, except by way of compromise; but here there was no claim against the estate nor any threat of a partition action which could form the basis of a compromise.

F. E. Farrer for the vendor. I cannot in a Court of first instance contend that a trust for sale confers a right to partition, having regard to the decision in *Brassey* v. *Chalmers*. (2) At law the only persons who could compel a partition were co-heirs, for which reason they were called co-parceners. The statute 31 Hen. 8, c. 1, made joint tenants and tenants in common of inheritance compellable to make partition in like manner as co-parceners; and this was extended by the statute 32 Hen. 8, c. 32, to persons having particular estates for life or years. Equity assumed power to compel a partition; but, whether or not the jurisdiction was subsidiary only to the right given by those statutes, equity always decreed partition as a matter of right ex debito justitiæ when a common law writ would lie: *Mayfair Property Co.* v. *Johnston.* (1) The executor is and always was a legal, and not an equitable officer; his rights were ascertained as early as the Year Book of Edw. I. He is the testator himself in a representative capacity. The so-called "powers" of an executor to sell, mortgage or pledge are not powers in any true sense at all, but are only incidents, and some only of the incidents, of his position, which in truth belonged to his testator. An executor has complete and absolute control over the property of his testator: see Lord Hatherley's judgment in *Earl Vane* v. *Rigden* (2), where he quotes Lord Thurlow in *Scott* v. *Tyler.* (3) The effect of s. 2, sub-s. 3, of the Land Transfer Act, 1897, is to give executors power to partition real estate (if they had it not before that Act), as real estate is to be administered with "the same incidents as if it were personal estate." But if an executor has no power to partition at law, yet that power is given by statute. A liberal construction should be placed on s. 21 of the Trustee Act, 1893; and a partition is, it is submitted, "a composition for any property" within the meaning of that section; and, as two other tenants in common could have compelled a partition against Fenn, who had a correlative right against them, a partition would be a "compromise" or settlement of something relating to Fenn's estate within the meaning of that section.

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(1) (1880) 16 Ch. D. 236, 243.

(2) (1852) 16 Beav. 223.

P. O. LAWRENCE J. In my judgment the applicant is entitled to succeed on this application. I have come to this conclusion with regret, because, in my opinion, the objection taken by the purchaser in this case is an objection which in these days, at all events, may be described as purely technical and, moreover, is one which cannot arise as regards transactions taking place after the Law of Property Act, 1922, comes into operation.

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(1) [1894] 1 Ch. 508.

(2) (1870) L. R. 5 Ch. 663, 668.

(3) (1788) 2 Dick. 712, 725.

My duty, however, is to decide this case according to the law as it stands at present, and the sole question is whether certain executors were entitled to join with their co-owners in a deed of partition of a piece of freehold land to an equal undivided one-third share in which their testator was entitled at the time of his death.

The primary duty of executors is to pay the funeral testamentary expenses and debts of their testator. This duty involves the executors being invested with ample powers of alienation for the purpose of raising money. They undoubtedly have a power of sale; they have a power of mortgaging and, in certain circumstances, a power of leasing. The power of leasing, however, is a power which, as I understand the law, cannot properly be exercised by executors for any other purpose than the raising of the money required for the performance of their executorial duties. As to this particular power Jessel M.R. in *Oceanic Steam Navigation Co.* v. *Sutherberry* (1) said: "It is quite true that, having the legal estate in the leaseholds, he"—that is the executor—"may in some cases underlet them, and the underlease will be supported in equity as well as in law. But that is an exceptional mode of dealing with the assets, and those who accept a title in that way must take it subject to the question whether it was the best way of administering the assets."

Counsel state that they have been unable to find any case in which executors have been held entitled or disentitled to effect a partition of freeholds or leaseholds. In the absence of authority the case must be decided according to general principles, unless Mr. Farrer is right in his contention that the Land Transfer Act, 1897, and the Trustee Act, 1893, contain express provisions empowering executors to effect a partition of real estate.

It is not disputed that since the Land Transfer Act, 1897, executors have the same powers with regard to real estate as they had before that Act with regard to leaseholds, but

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(1) 16 Ch. D. 236, 243.

Mr. Farrer contends that by virtue of s. 2, sub-ss. 2 and 3, of that Act an express power to effect a partition of real estate is conferred upon executors. Sect. 2, sub-s. 2, enacts, amongst other things, that "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him." That enactment, in my judgment, does not purport to confer upon executors any powers over real estate which were not then possessed by executors over chattels real, and consequently, so far as that sub-section is concerned, one is thrown back upon the question whether executors, before the passing of that Act, had power to effect a partition of chattels real.

Sub-s. 3, so far as material, is as follows: "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were personal estate": and then it goes on to provide that "nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies." In my opinion that sub-section has no bearing on the question I have to decide. It does not purport to confer any power upon an executor to partition either real or leasehold estates. The effect of this sub-section is to enable executors to administer real estate in the same manner as if it were personal estate, but without altering the established order of the administration of assets.

The next enactment which Mr. Farrer relied upon as conferring upon executors an express power to effect a partition of real estate is the Trustee Act, 1893, s. 21. By that section a power is given to an executor first—I quote so much of the section only as is material for the purposes of this case—" to accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed," and secondly, to " compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust."

In my judgment the deed of partition in this case was not an acceptance by the executors of a composition for a debt nor of a security for any real or personal property claimed, within the meaning of the first branch of this section. Further, I am of opinion that, in the circumstances of this case, the deed of partition was not executed by way of compromise or settlement of a claim or thing relating to the testator's estate within the meaning of the second branch of this section. Had an action for partition been commenced or even threatened by one or both of the other co-owners against the executors and had the executors, in order to avoid the expense of a partition action, agreed to a partition by way of compromise or settlement, it may very well be that such a partition would be upheld as coming within the powers conferred upon executors by s. 21. In the present case, however, nothing of that kind took place. After various unsuccessful attempts to sell the property as a whole, the co-owners agreed to a partition. No dispute or question had arisen between them which could form the basis of a compromise or settlement within the meaning of the section.

In the result I have come to the conclusion that neither the Land Transfer Act, 1897, nor the Trustee Act, 1893, confers a power on executors to effect a partition of real estate, and that the present case must be decided on general principles. In support of the contention that an executor, as the legal owner of the undivided share, has an inherent power to effect a partition of the property, I have been referred to Lord Hatherley's decision in *Earl Vane* v. *Rigden*. (1) It is important, however, before considering the effect of Lord Hatherley's judgment, to state what that case was about. The executrix there had assigned the book debts of her testator to one of the creditors to secure the payment of his debt, and had given him a power of attorney to collect the debts in her name. The Court of Appeal, reversing the judgment of Malins V.-C., held that that assignment was valid. In that case no question arose as to the power of an executor over chattels real or over real estate. The sole question was whether the executor, without any fraud or collusion with the creditor, had power to charge book debts which formed part of the assets in favour of a creditor for the purpose of securing his debt. It is obvious, therefore, that Lord Hatherley was not considering any such question as has arisen in the present case, and I think that his observations must be taken as having been directed to the facts before him. Lord Hatherley L.C. in giving judgment (1) said : "As long ago as the case of *Scott* v. *Tyler* (2) Lord Thurlow expressed his opinion clearly to be that the executor is at liberty either to sell or to pledge the assets of the testator. In fact, he has complete and absolute control over the property, and it is for the safety of mankind that it should be so ; and nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor. That, like all other frauds, will vitiate any transaction whatever." It would, I think, be straining Lord Hatherley's words unduly to hold that he intended to suggest that an executor's control over his testator's leaseholds could be so absolute and complete as to enable him to effect a partition of such leaseholds. What Lord Hatherley was insisting upon was that the executor's control over the personal property was so complete and absolute as to involve his having a power to pledge that property for the purpose of securing to one of the creditors the payment of his debt. The later part of Lord Hatherley's judgment, also, in my opinion, is clearly referable to the particular facts of the case before him. When dealing with the case of *Russell* v.

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(1) L. R. 5 Ch. 663.

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(1) L. R. 5 Ch. 663, 668.

(2) 2 Dick. 712, 725.

Plaice (1) Lord Hatherley says: "The Master of the Rolls held, as it seems to me, quite correctly, that in the eye of this Court, as well as in the eye of a Court of law, the executor is the absolute owner of the property; he does not stand in the position of a delegatus, and nothing can intercept that ownership, except fraud or collusion as between him and the parties with whom he deals." It is, I think, obvious that neither Lord Romilly nor Lord Hatherley intended to hold that the ownership of the executor is so absolute as to enable him to give or throw away his testator's personal property or even to grant leases or effect a partition of his testator's leaseholds. The power of effecting a partition of property does not seem to me to fall readily into the category of powers of realization and of raising money. A partition, when looked at strictly, amounts to the acquisition of an additional estate in a part of the property in consideration of parting with an undivided interest in the rest of the property. Such a transaction does not ordinarily result in the raising of money and is therefore, in my opinion, not such a realization of the estate of the testator as falls within the purview of the duties of an executor. In the present case the partition was effectuated not for the purpose of more readily selling the property allotted to the executors, as this property had already been unsuccessfully offered for sale, but for the purpose of retaining it until a more favourable opportunity for realization should occur. In my view, as the law stands at present, the executors had no power to do that, and therefore the title offered to the purchaser in the present case is not a good title. As the purchaser now desires to be rid of his bargain, I feel bound, for the reasons I have stated, to decide that he is entitled to be relieved from his contract.

Accordingly, there will be a declaration that the vendor has not shown a good title to the property; there will be an order for the return of the deposit with interest and for payment by the vendor of the purchaser's costs of investigating the title and of this application.

H. C. H.

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(1) (1854) 18 Beav. 21.

The vendor appealed. The appeal was heard on January 31 and February 1, 1923.

Owen Thompson K.C. and *F. E. Farrer* for the appellant. It does not lie on the appellant affirmatively to prove that the executors have the power, but on the respondent to prove that they have not the power to join in a partition deed. Partitioning in this case is merely a preliminary step towards realization, which is the duty of the executor. It is easier to sell a severalty than an undivided third, and it is more advantageous for executors to be able to sell at their own discretion as to time and price, etc. The execution of a deed of partition with a view to sale is a proper step in the administration of the estate.

The so-called " powers " of an executor to sell, mortgage, or pledge the assets are not in any true sense " powers " at all : they are incidents, and only some of the incidents, to the position which the executor has as the personal representative of his testator, as continuing the very persona of the dead testator.

Nothing which the executor does can be disputed except on the ground of fraud and collusion between himself and the person with whom he deals ; the executor is, so far as regards third parties dealing without notice of any impropriety, in equity as well as at law absolute owner of the assets : *Earl Vane* v. *Rigden* (1) ; Williams on Executors, 11th ed., vol. i., p. 693.

Here the testator had right of action to compel partition, and was under liability to be compelled thereto : this legal right and liability was given and imposed to and upon tenants in common by the statutes 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32. Only parceners could compel partition at common law, hence their name. Equity indeed as a practical matter acquired sole jurisdiction in partition because of its power to compel discovery of defendant's title: Mitford's Pleadings in Chancery, 5th ed., p. 142.

But wherever at the common law a writ of partition would lie, equity held, that regardless of convenience, or of the fact that the action would exhaust the value of the estate, a decree for partition was of right: *Mayfair Property Co.* v. *Johnston* (1) and cases there cited.

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(1) L. R. 5 Ch. 663, 668, 669.

Why should the testator's death strike the estate with paralysis? His executors succeeded to his right of action: Swinburne on Wills, 1st ed. (1590), p. 13.

There is no absolutely direct authority, that executors could join in a partition of leaseholds; see Wentworth's Office and Duty of an Executor (ed. 1763), pp. 79, 80, 99, and specially p. 106; 14th ed. (1829), pp. 185, 213, 221.

We submit that the last passage is authority on the point, not because of the decision there cited, but because of the writer's mode of stating it.

This dearth of authority is understandable; cases of partition of an estate consisting merely of leaseholds are naturally very rare. Often, as happened in one case, *North* v. *Guinan* (2), the only mode of partition would be structural, which would be waste, and against the covenants of the lease. But cases of partition of leaseholds are recorded: *Ames* v. *Comyns* (3); *Beedle* v. *Clerke* (4); though the only case of executors so partitioning is that in Wentworth's Office and Duty of an Executor (1769 ed.), p. 103. (5)

If principle is with us, absence of judicial precedent is nothing, there was no judicial precedent for the decision in *In re Cavendish and Arnold's Contract* (6), since affirmed in *In re Chaplin and Staffordshire Potteries Waterworks Co.'s Contract.* (7) The severalty taken in law on a simple partition is never regarded in law as a new acquisition, but as the very same thing as the old undivided share. Hence if two daughters inherit from a mother, and make partition, and one dies intestate, the entirety of her severalty will descend on her heir ex parte materna: Preston on Abstracts, 2nd ed., vol. ii., p. 71; Watkins on Descents, 4th ed., p. 10*n*. Hence too even under the old law, if one tenant in common devised her "moiety" of a manor, and afterwards joined in simple partition, that not only did not revoke the devise, but the devise passed the entirety of the severalty: *Luther* v. *Kirby* (1); *Risley* v. *Baltinglass* (2); *Webb* v. *Temple*. (3) These cases show the policy of the law to encourage partition: see also Gilbert on Rents, p. 19.

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(1) [1894] 1 Ch. 508.

(2) (1829) Beatty, 342.

(3) (1867) 16 W. R. 74.

(4) (1609) Cro. Jac. 218.

(5) After the arguments had closed counsel discovered that as a fact an executor had joined in a partition taking the severalty as executor. See the deed stated in *Woodhouse* v. *Okill* (1836) 8 Sim. 151.

(6) [1912] W. N. 83.

(7) [1922] 2 Ch. 824.

There would be nothing unusual in this partition: till 1868 the only right a tenant in common had was partition, and the Partition Acts of 1868 and 1876 confer no jurisdiction on the Court, without a request, to order a sale. Trustees for sale of the share of a deceased tenant in common can bring partition action: *Stace v. Gage*. (4)

Why should not the executors have joined in this deed? *In re Chaplin and Staffordshire Potteries Waterworks Co.'s Contract*. (5) The estate as a whole had been put up without success; they would by the partition get sole dominion over the severalty, without having to consult the old co-owners as to reserves, etc. The price of an undivided share sold is much less than the correlative share of proceeds of sale of an entire estate.

Topham K.C. and *J. Bradley Dyne* for the respondent. The vendor has not shown a good title in this case. The executor's power is that of realization, primarily by sale. The question is whether what has been done here was a proper act of administration. If this particular step in the administration of the testator's estate is not realization then the burden is on the vendor to show that it was done in due course of administration. Prima facie partition is not realization; it is rather an alternative to sale. At law the duty of the executor was to realize the estate for the payment of debts, etc., a duty which involves a power of sale, but not partition.

(1) (1730) 8 Vin. Abr. 149; 3 P. Wms. 170n.

(2) (1673) 8 Vin. Abr. 144; Sir T. Raym. 240.

(3) (1683) Freeman, K. B. & C. P. 542.

(4) 8 Ch. D. 451.

(5) [1922] 2 Ch. 824, 838.

[LORD STERNDALE M.R. referred to *Simpson* v. *Denny* (1) and *Stace* v. *Gage*. (2)]

Although trustees for sale have no power to partition they can sue for it: *Goodrich* v. *Marsh*. (3) In *M'Queen* v. *Farquhar* (4) it was held that a power of sale was not well executed by a partition.

[WARRINGTON L.J. It has never been questioned that a power of sale does not authorize partition, but does not a power of sale and exchange do so? *In re Frith and Osborne*. (5)]

A power to trustees "to sell and dispose of" the testator's real estate does not authorize a partition: *Brassey* v. *Chalmers*. (6)

In *Oceanic Steam Navigation Co.* v. *Sutherberry* (7) it was held that an administrator could not grant an underlease of his intestate's leaseholds with an option of purchase, at a fixed price, at a future time.

The duty of the executor is discussed in Wentworth's Office and Duty of an Executor (ed. 1728), p. 129. See also 2 Blackstone's Com., pp. 510, 511, and Perkins' Profitable Book, paras. 486, 488.

The main duty of the executor being to realize by sale for the purposes of administration his extensive powers must be exercised for that purpose.

[*Hill* v. *Simpson* (8) and *M'Leod* v. *Drummond* (9) were also referred to.]

In re Verrell's Contract (10) shows that even where executors are exercising their primary power of sale, unless it appears that they are doing so for the payment of debts the title conferred on a purchaser is a doubtful one which the Court will not force upon a purchaser. No doubt that case was a very peculiar one.

[WARRINGTON L.J. The title here is either a good or a bad one. There is no question as to its being a doubtful one.]

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(1) (1878) 10 Ch. D. 28.

(2) 8 Ch. D. 451.

(3) [1878] W. N. 186.

(4) (1805) 11 Ves. 467.

(5) (1876) 3 Ch. D. 618.

(6) 16 Beav. 223; (1853) 4 D. M. & G. 528.

(7) 16 Ch. D. 236.

(8) (1802) 7 Ves. 152.

(9) (1807) 14 Ves. 353; (1810) 17 Ves. 152.

(10) [1903] 1 Ch. 65.

Every purchaser who has bought under this title has had knowledge of its defect.

It is submitted therefore (1.) that in no case can executors partition even if such partition be ancillary to the realization of the estate, and (2.) that even if they can, it being outside their province to do so, they must show that a partition is the best means of administering the assets.

The keystone to the argument for the respondent is *Keating* v. *Keating* (1), which was quoted with approval by the Court of Appeal in *Oceanic Steam Navigation Co.* v. *Sutherberry.* (2) That case shows that the proper means of exercising an executor's power is by sale. The rule laid down by the Lord Chancellor in that case is very appropriate to the present.

An executor has no power to sell for land. That is what the executors in fact did in this case. A power to sell and realize does not justify a partition. There is not a single reported case which suggests that the power of an executor is other than a power to sell for cash. There is no evidence here to show that the executors could not have joined with their co-owners in a sale of the property in lots. All the authorities show that the power is a power to realize for money.

Partitioning and concurrence in partitioning are not within the powers of executors as such. Such a method is unusual for executors to adopt in dealing with leaseholds.

The vendor here has not carried out his contract to make a good title. The Court will not force upon a purchaser a contract which depends on facts which may be disputed in a Court of law: *Nottingham Patent Brick and Tile Co.* v. *Butler.* (3)

It is contended on behalf of the appellant that even if the partition be bad it cannot be set aside because there have been subsequent dealings with the property. But in

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(1) (1835) Ll. & G. temp. Sugd. 133.

(2) 16 Ch. D. 236.

(3) 16 Q. B. D. 778, 787.

Underhill's Law of Trusts and Trustees, 7th ed., p. 518, it is stated: "If trust property comes into the hands of any person inconsistently with the trust, he will be a mere trustee for the beneficiaries under the trust, unless he or some person through whom he claims, has bona fide acquired the property for valuable consideration, and without receiving notice before the transaction was completed, that the acquisition was a breach of trust."

Owen Thompson K.C. in reply. The saleable value of an undivided fractional share of a real or leasehold estate may be less than the same fractional share of the sale value of the entirety of such estate. See as to the practice in valuations Webster-Brown's Finance Acts, 4th ed., p. 155. In partitioning therefore the executors were acting properly and thereby enhancing the value of the estate.

It is admitted that a trustee cannot divide the property in specie among the beneficiaries. An executor is liable to suffer a partition of the estate by the other co-owners and therefore can partition voluntarily. The partition here was made with a view to a proper administration of the estate. It was not a realization of the estate but a step towards it.

Cur. adv. vult.

March 5. The following written judgments were delivered:

LORD STERNDALE M.R. This case proceeded before P. O. Lawrence J., from whose decision the appeal is brought upon an agreed statement of facts, and I therefore refer to that statement without setting it out in my judgment. The question raised is one which may have been of great importance before the passing of the Law of Property Act, 1922, but is now probably of interest only to the parties to this appeal. It is whether executors have a right to concur in a partition of property which was held in common by their testator and other persons. It arises in this way. The vendor derives title through a Mr. Docking, who was entitled in fee simple together with other persons of the names of Fenn and Hooker to certain property as tenants in common.

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Fenn died, and his executors and the other tenants in common attempted to sell the property but failed to do so. The executors and the other tenants in common then agreed to a deed of partition by which the lands contracted by the vendor to be sold to the purchaser were allotted and conveyed in severalty to the vendor's predecessor in title. The purchaser now takes the objection that Fenn's executors had no power to agree to a partition, and therefore the vendor has not a good title. I agree with the learned judge that the objection is a mere technicality. It must be remembered that the question here is one of the powers of executors and not of trustees for sale. It is true that by the will the executors after the fulfilment of their duties as executors hold the testator's residuary estate upon trust for sale and then the proceeds upon certain trusts. It has been clearly decided that trustees holding property upon a trust for sale and not for sale and exchange cannot partition because their powers are limited by the terms of the trust and partition is not sale. Here however it is admitted that the executors' duties as executors still remained unfulfilled at the time of the partition and they were consequently acting as such. Now the executors' powers, though in a sense derived from the will, for if there were no will there would be no executors, are not confined to power given by the will as in the case of trustees under a trust for sale, but arise virtute officii. When the question is asked, Can an executor concur in a partition? I confess my inclination, in the absence of authority to the contrary, is to ask, as Scrutton L.J. did in *In re Chaplin and Staffordshire Potteries Waterworks Co.'s Contract* (1), Why should he not? His power and duty is primarily to realize the estate for the purpose of paying debts, etc., and it seems to me that any act of administration which tends to the easier and better realization of the estate is prima facie within his powers, and that if it be said that it is an unusual method, such as that contemplated by Jessel M.R. in *Oceanic Steam Navigation Co.* v. *Sutherberry* (2), it lies upon the person objecting to the exercise of the power to show it. I do not

(1) [1922] 2 Ch. 824, 838.

(2) 16 Ch. D. 236, 243.

think it can be said of itself to be such an unusual way of discharging an executor's duties as to put a purchaser on inquiry. An executor who finds that part of an estate which it is his duty to realize is held in common with others is put in a difficulty. To realize his undivided share is by no means easy to do, and to realize the whole requires the concurrence of the other tenants in common in the sale and in its incidents —price, reserve, etc. To agree to a partition seems to me to be a natural and reasonable method by which an executor can put himself in a position easily to administer and realize his testator's estate. This is especially so in a case like this where the land held in common is building land in different lots easily severable and intended to be disposed of in different lots. I do not say what might be the result if it were shown that the partition was for the purpose of a permanent holding of the land severed as part of the testator's estate and not merely a step in administration. Nothing of that kind is shown in this case and I think it is for the purchaser to show it.

I think therefore that the purchaser's objection cannot be sustained. I come to the conclusion with hesitation, as I am differing from the decision of P. O. Lawrence J. on a difficult and technical subject with which I am not familiar, but I am glad to find that the other members of the Court agree with me.

The result is that the appeal must be allowed and a declaration made that the vendor has shown a good title. The purchaser must pay the costs here and below.

WARRINGTON L.J. The question in this case is whether the vendor has made a good title to certain plots of freehold building land comprised in a contract for sale. These plots form part of a larger number to which three persons, including the predecessor in title of the vendor, were entitled in equal shares as tenants in common in fee simple. One of these persons, not the one through whom the vendor derives title, died in the year 1913, having made his will, whereby he appointed executors and devised to them all his real estates

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upon usual trusts for sale. Under the Land Transfer Act, 1897, and by virtue of their appointment the undivided share above mentioned became vested in the executors with the powers and duties in the statute mentioned, being in effect those of legal personal representatives in relation to chattels real. Six months after the testator's death, while their duties as executors still remained unfulfilled, they concurred with the two other tenants in common in a partition of the plots of land, and on such partition the plots comprised in the contract were allotted and conveyed in severalty to the vendor's predecessor in fee simple. The purchaser objects that the executors had no power to effect a partition; the judge has upheld their objection and has declared that the vendor has failed to make a good title. The vendor appeals.

Attempts had been made by the executors in conjunction with the other two tenants in common to sell the plots as a whole, but they had not been sold. As already stated the executors were not functi officio, and there is no evidence that in joining in the partition they had any other object than the convenient realization of their testator's estate.

I think the question is—May the concurrence of the executors in a deed of partition be regarded prima facie as an act done in the proper performance of their duty as executors? Their duty includes that of the realization of the estate for the purpose of paying debts, funeral and testamentary expenses and legacies, and it is well settled that no purchaser or mortgagee is liable to have his title called in question unless he has actual notice of the impropriety of the transaction. Does this principle apply to the present case? If it does, the purchaser will obtain a good title, for he has no notice of any improper conduct on the part of the executors other than the execution of the deed of partition.

An executor finding himself in possession as part of his testator's estate of an undivided share of land is in a most difficult position. If he is called upon to realize he must either sell the undivided share—a most unprofitable course to pursue—

or he must obtain the concurrence of his co-tenants not only in a sale at a time which may be inconvenient to them, but in all the terms of sale, including of course the price and, in cases of sale by auction, the reserve. By concurring in a partition he frees himself from these difficulties and puts himself in a position to realize to the best advantage and without delay in case, as often happens, a speedy realization becomes necessary. Of course there may be cases in which the nature of the property is such that a partition cannot be conveniently effected, but the present is one to which it was particularly appropriate, the property held in common being a number of parcels of building land capable of being easily allotted in severalty among the co-tenants. I think in such a case the concurrence by the executors in a partition ought to be treated as a proper and ordinary step towards the profitable realization of the testator's estate, so that those who claim under it may obtain a good title unless they have notice of some impropriety in the transaction other than the fact of partition itself. I am quite aware that there is no authority directly supporting the view I have expressed, but there is no authority to the contrary, and I think we are quite at liberty to uphold a transaction which is so obviously convenient and may often be necessary.

I wish to add a word of caution. It has long been recognized that a mere power of sale or trust for sale as distinguished from one for sale and exchange vested in trustees does not authorize a partition, and I wish to throw no doubt on the correctness of this view, but this results from the construction of the instrument creating the trust or conferring the power, the Court coming to the conclusion that on its true construction such a mode of dealing with the property is not authorized. The case of an executor is different; he derives his powers from his appointment as executor and they are not limited in ordinary cases by the terms of the will.

On the whole I am of opinion that the order of P. O. Lawrence J. should be discharged and a declaration made that a good title has been shown, and the purchaser should be ordered to pay the costs here and below.

YOUNGER L.J. The testator William George Fenn, with the powers of whose executors we are concerned in this appeal, died on November 11, 1913, having by his will made in 1912 appointed his widow, his son, his daughter, and the Public Trustee to be his executors. He also appointed the same persons to be his trustees and devised and bequeathed to them his real and personal estate not by his will otherwise specifically disposed of upon trust for sale with power to postpone. The will of the testator was duly proved by the executors on January 31, 1914.

It appears from the documents before us that the testator had on July 29, 1907, joined with two other persons, Frederick Reynolds Docking and Walter Hooker by name, in the purchase for 8000*l.* of certain hereditaments and building land known as "Birdhurst," Croydon. The three were interested in the premises in equal shares as tenants in common, and they had been engaged in the development and sale of the land as a building estate. It had been duly plotted: roads had been set out and made up and certain of the plots had been sold and buildings erected upon them. But the greater part of the property remained in hand although it had from time to time been offered for sale by auction. The executors of the testator accordingly, on proving his will, had amongst the testator's property vested in them as such this undivided interest in this partially disposed of building estate. By virtue of s. 2, sub-s. 2, of the Land Transfer Act, 1897, the executors were possessed of such powers over this property as they would have possessed when that Act passed, had the property been chattels real of their testator vested in them as his executors. As to the extent of these powers there is up to a point no dispute. It is of course agreed that the executors had the fullest power to sell and convey the testator's undivided interest in this building estate. No one however suggests that such a property is a readily saleable interest. Indeed no substantially equivalent interest in this property less likely to command an adequate price can easily be named. The executors again might have joined with the two other co-owners in the sale at agreed prices of the property as a whole or in plots. But any possible agreement to any such sale might be reached not primarily by reference to the interests of the testator's estate but by reference to the interests or necessities of one or both of the other co-owners. And here the executors' effective powers of sale ended, the one unpromising, the other full of possible embarrassment. On the other hand, the executors' two co-owners could have demanded a partition in proceedings to which the executors would have been the only necessary defendants as representing their testator's estate, and in such proceedings a partition exactly as in the event was here carried out could have been validly decreed and equally validly submitted to. Such was the entire position of the executors with reference to this property.

The question which on this appeal we have to determine is whether their first act in relation to it was within their powers. That act was to concur with Mr. Docking and Mr. Hooker in entering on May 2, 1914, into the partition deed of that date. Is that deed effective to bind the estate of the testator and all persons interested in it to the partition thereby made?

The fairness of the partition is not challenged. No objection to it is raised by any person interested in the testator's estate. The "green land" which is the portion of the respondent's purchase affected by the deed was not thereunder allotted to the executors. It was part of the land allotted to Mr. Docking which from him, through sundry mesne purchasers, and ultimately by an exchange, has devolved upon the appellant, the vendor. This with other land the respondent has agreed to purchase, and his objection to the vendor's title is that, as the testator's executors were, as he contends, without power to bind their estate by the deed of partition which they executed, no title in severalty to the green land passed to Mr. Docking and no such title has devolved upon the vendor. The learned judge, although with great reluctance—for the objection is in his view a pure technicality—has accepted the purchaser's contention and has held that this objection to the title is well founded. Hence this appeal.

Now, as I read his judgment, the learned judge seems throughout to be directing his attention to the question when or how executors acquired any power to be effective parties to a deed of partition like the present. With my Lord and Scrutton L.J. in the passage already quoted from the Lord Justice's judgment in *In re Chaplin and Staffordshire Potteries Waterworks Co.'s Contract* (1) I think the question here rather is "Why should not the executors have dealt with this land as they did?" This deed of partition was not, in my judgment, as Mr. Topham so strongly insisted it was, a novel and unusual method of disposing of the testator's property. I have set forth the circumstances attending its execution for the purpose of enabling me now to emphasize what as it seems to me the deed really was. It was, as I see it, a convenient conversion of the testator's undivided third interest in this entire building estate into an interest in severalty in a third of the whole so as to make possible first the more beneficial, and next the uncontrolled realization of the testator's interest in the property if and when the occasion for such realization by the executors became urgent or expedient. The partition was a preliminary to realization, not a substitute for it. Why should not the executors have entered into it?

The powers of executors, as such, over the property of their testator vested in them have always been expressed in the widest possible terms. If in their origin the purpose of these wide powers is correctly explained by Perkins in his Profitable Book, paras. 486, 488, in the passage quoted to us by Mr. Topham—namely, that "the soul of the testator shall not be in danger for the non-payment of his debts," one need feel no surprise at the wide generality of the judicial language in which executors' powers are invariably described. The language used is indeed comprehensive. Lord Hatherley's statement of their position in *Earl Vane* v. *Rigden* (2) is merely an echo of similar expressions to be found in the Reports passim. It must, however, be agreed that the powers of an executor

(1) [1922] 2 Ch. 824, 838.

(2) L. R. 5 Ch. 663, 669.

over the property he takes from his testator, large as they are, both at law and in equity, are taken, as Lord Eldon said in *M'Leod* v. *Drummond* (1), for the purpose of enabling him to fulfil his trust. But this is not to say that any powers incidental to the beneficial attainment of that purpose are denied. In this connection it is not without interest to observe the justification which James L.J. in *Earl Vane* v. *Rigden* (2) gives for conceding to an executor his undoubted power to pledge his testator's assets. "It seems to me to be settled on principle," he says, "as well as by authority, that an executor has full right to mortgage as well as to sell, and it would be very inconvenient and very disastrous if the executor were obliged immediately to convert into money by sale every part of the assets of the testator. It is a very common practice for an executor to obtain an advance from a banker for the immediate wants of the estate by depositing securities. It would be a strange thing if that could not be done."

How very applicable is that reasoning to the present case. To my mind all that we are doing in upholding the deed of partition here is to apply that broad principle to an analogous case. We are invoking it to justify and uphold the validity of this partition deed as a natural and proper step towards the beneficial realization of this asset of the testator's.

But it is objected that no trace can be found in the books of any such act on the part of an executor ever having been done or upheld. I am not surprised that no case upon the point is on record. Prior to 1897 the property in the hands of an executor susceptible of partition would practically be confined to chattels real; and under many if not under most leases a partition would be greatly hampered if not made quite impracticable by the terms of the lease itself. The case of *Ames* v. *Comyns* (3) is an interesting example of the inconvenience of attempting in a normal case a partition of leaseholds. But the power of an executor to demand a partition, with, presumably, a power to agree to one, is not without some recognition in the books, few as must have been the occasions on which it was exercisable. Wentworth in his Office and Duty of Executors, 14th ed., p. 221, says this: "Where judgment is once given in a writ of partition for a term or, ... if the plaintiff die before second judgment . . . . the executor is not put to a new suit but may proceed by scire facias upon the former judgment"—a passage the significance of which I am not in the circumstances disposed to underrate. Again, it is pointed out that trustees for sale have no power to effect a partition. This is not the occasion to trace the hesitating and somewhat confused history of that disability. I agree with the Lord Justice that the powers of executors virtute officii are in no way paralleled by the powers of trustees for sale with which we are not here concerned. A difference in one respect between them—as I ventured to point out in *Chaplin's Case* (1)—will be found by comparing the *Oceanic Case* (2) with the case of *Evans* v. *Jackson.* (3)

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(1) 17 Ves. 152, 153.
(2) L. R. 5 Ch. 663, 670.
(3) 16 W. R. 74.

Next it was said that the *Oceanic Case* (2) just cited shows that this partition must be affirmatively justified by the vendor, for that it is an unusual method of realization. To that contention one answer, I think, is that the real objection to the transaction in the *Oceanic Case* (2) was that it was not a sale at all and that instead of being conducive to a sale it effectively hampered one. I have nothing to add to what on that point I said in *Chaplin's Case.* (1) This deed of partition is not justified as a form of realization. It realizes nothing. It is justified only as a preliminary to a beneficial realization—as being reasonably incidental to the beneficial exercise of the executors' admitted powers.

The learned judge seems to have drawn the inference from the facts of this case that the executors acquired the fee in the entirety of a portion of the undivided property "not for the purpose of more readily selling the property allotted to the executors, as this property had already been unsuccessfully offered for sale, but for the purpose of retaining it until a more favourable opportunity for realization should occur." This does not suggest itself to my mind as being either the necessary or indeed the natural inference to be drawn from the circumstances known to us. If I had thought that it was, I might have had more difficulty than I feel in answering the question which I put to myself by saying as I do that I can see no reason at all to doubt that the executors here had perfect power to enter into and to bind their testator's estate by the deed of partition which in this case they executed.

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(1) [1922] 2 Ch. 824, 845.

(2) 16 Ch. D. 236.

(3) (1836) 8 Sim. 217.

In my judgment the purchaser's objection to the title fails and this appeal should be allowed.

Appeal allowed.

Solicitors: *Walbrook & Hosken; Nicholls & Co.*

W. I. C.

WILLS *v.* MAY.

[1922. W. 3149.]

P. O. LAWRENCE J.
1923
Feb. 8, 9, 14.

Ancient Light—Obstruction—Measure of Damages—Site Value.

The plaintiff was the owner of a small two-storied house, No. 117, whose windows on the north side were ancient lights; she was also the owner of No. 119, a house similar to and adjoining No. 117 on the south. The defendant, who owned No. 115, to the north of and adjoining No. 117, converted the same into a shop with offices above it, and so obstructed the access of light to the ancient windows of No. 117. In an action for damages caused by that obstruction, it appeared that the site of No. 117 lent itself to development by the erection of a shop; that the character of the district was in process of changing from a residential to a commercial one; that the plaintiff bought Nos. 117 and 119 as an investment with a view to developing their sites as a building site for commercial purposes; that the sites could together be formed into a single site suitable for such purposes, though the development thereof might be delayed for a few years owing to the existence of a lease affecting No. 119. It further appeared that the obstruction of light on the north side of No. 117 had rendered the sites of the plaintiff's houses less valuable as a building site for commercial purposes:—

Held, that, in the circumstances, the Court was entitled, in estimating the damages caused to the plaintiff by the obstruction, to take into consideration not only the immediate damage done to the house standing on the site of No. 117, but also the damage to the combined sites of Nos. 117 and 119 treated as a building site adaptable to commercial purposes, notwithstanding that the site of No. 119 might not be immediately ripe for development.

Griffith v. *Richard Clay & Sons, Ld.* [1912] 1 Ch. 291 applied.

Witness Action.

The plaintiff was the owner of a small two-storied dwelling house known as No. 117 Church Street, Croydon, and also of another house of a similar character adjoining No. 117 on the south and known as No. 119 in the same street. No. 117 contained on the ground floor a sitting-room, kitchen and scullery and on the upper floor three bedrooms. In the wall forming the north side of No. 117 were two small windows which were ancient lights. One of those windows lighted the landing and staircase on the upper floor, the other window lighted a small closet used as a larder on the ground floor. The larder window opened on to the plaintiff's passage, 4 feet in width, and 28 feet in length, which ran along the north side of the house and was covered by a corrugated iron roofing supported upon a partly-glazed framing next the defendant's boundary wall, pitched therefrom towards the plaintiff's house to a level below the first-floor window.

Before 1918, the passage had enjoyed access of light through a large window overlooking the defendant's premises, No. 115 Church Street. In 1918, the defendant built a wall which blocked up the lower part of the passage window, but left the upper part above the wall to the extent of about 18 feet in length by 2 feet in height unobstructed.

In July, 1922, the defendant developed the site of No. 115 by building thereon a shop with offices above, and thereby obstructed the light to the passage and larder and landing windows previously enjoyed by the plaintiff.

The plaintiff accordingly commenced this action, in which she claimed a mandatory injunction or damages in lieu thereof and also damages in any event. The Court held that the defendant had deprived the passage and larder windows of the light which they had previously enjoyed and that the landing and staircase were sensibly less fit for their purposes than they were before the defendant erected his building; but weighing the comparative injury to the plaintiff and the defendant and the advantage gained by the plaintiff, if a mandatory injunction were granted, and having regard to all the circumstances of the case, the Court refused to grant a mandatory injunction, being of opinion that the plaintiff would be adequately compensated for the injury she had suffered by a money payment.

The main question for the decision of the Court related to the amount of damage to which the plaintiff was entitled. It was proved that by means of certain structural alterations the passage, staircase and larder could be rendered as comfortable as they had been before the erection of the defendant's building and that those alterations could be carried out at a cost of about 50*l*. But at the trial the plaintiff claimed to be entitled to damages in respect of the obstruction of light on the north side of the site of No. 117, treating the sites of Nos. 117 and 119 as one site adaptable to commercial purposes. The following further facts were proved at the trial:

The site upon which the plaintiff's house stood lent itself to development for the erection of a shop of much the same height and character as that which the defendant had erected upon his site adjoining the plaintiff's property. The character of the neighbourhood was in process of changing from a residential to a commercial one. The plaintiff purchased Nos. 117 and 119 Church Street at public auction in February, 1921, which were offered for sale in one lot under the following description: "Nos. 117 and 119 Church Street Croydon. Situate in the busiest commercial centre of the town." The particulars of sale also contained the following: "Land values in this area have considerably increased during the last few years, and though the buildings comprised in this property are old, they still have several years' life, while the land, which covers an area of nearly a quarter of an acre, offers an excellent opportunity for securing a site for a factory or other commercial premises."

The sites on which those two houses stood formed a compact site suitable for the erection thereon of a factory or warehouse. It was not possible to carry out the contemplated development until the expiration in about fourteen years of the lease to which No. 119 was subject, unless in the meantime the landlord accepted a surrender.

It was also proved that the sites had been rendered less valuable for the erection of warehouses or other buildings for commercial purposes through the obstruction of light to the north side of the plaintiff's property No. 117 Church Street.

Jenkins K.C. and *J. Norman Daynes*, for the plaintiff. The damages ought not to be limited to the actual present damage done to the plaintiff's house as it now stands, but the damage caused by the obstruction of light to the sites of both the plaintiff's houses ought to be taken into consideration in estimating the amount of the damages. Those damages are the direct result of the wrongful act of the defendant in obstructing the plaintiff's ancient lights and he is responsible for those damages. The present case is governed by *Griffith* v. *Richard Clay & Sons* (1), although, in that case, the houses whose light was interfered with were old and so dilapidated as to be likely to be demolished and the site was ripe for development, while here No. 117 might have a few more years of life and there might be some delay in developing the site of No. 119; nevertheless the principle of that case is applicable to the facts of this case. The rule is stated by Lord Esher in *In re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Walk Schools* (2): "Where a plaintiff has a cause of action for a wrongful act of the defendant the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act." In *Horton* v. *Colwyn Bay and Colwyn Urban Council* (3) the facts were

(1) [1912] 1 Ch. 291.

(2) (1889) 24 Q. B. D. 326, 329.

(3) [1908] 1 K. B. 327.

different; there, no actionable wrong had been done to the plaintiff and therefore that case did not fall within the principle of the *Tilbury Case*. (1)

Owen Thompson K.C. and *Buckmaster* for the defendant. It would be extending beyond its proper limits the site value doctrine of *Griffith* v. *Richard Clay & Sons* (2), if it were applied to the present case. The facts here are materially different from the facts in that case. In the present case there may be some evidence in favour of the development of the sites for shops, but not for warehouses. The site of No. 119 could not be developed for fourteen years. The principle is applicable only to a case where the site is immediately ripe for development and must be kept within reasonable limits.

Cur. adv. vult.

Feb. 14. P. O. LAWRENCE J. [after having refused to grant a mandatory injunction for the reasons above mentioned and assessed the damages in respect of the obstruction of light to the plaintiff's windows at the sum of 50*l.*, and after stating that those damages did not represent the whole of the damages to which the plaintiff was entitled and referring to the special incidents, mentioned above, relating to the prospect of the future development of the sites of the plaintiff's properties as a building site for commercial purposes and the purchase thereof by the plaintiff as an investment, continued :] In these circumstances the question is whether the plaintiff is entitled to have the damages in respect of the obstruction of the light on the north side of the site of No. 117 Church Street estimated on the footing that the two plots on which the houses Nos. 117 and 119 are erected may be treated as a single site suitable for the erection of a factory or warehouse or some other building to be used for commercial purposes. It has been proved that those plots have been rendered less valuable for the erection of buildings of a commercial character owing to that obstruction of the light. In my judgment, this question of damages is covered in principle by the decision in *Griffith* v. *Richard Clay & Sons* (1), according to which I think that I am entitled to take into account the special incidents to which I have referred. It is true, as Mr. Owen Thompson has pointed out, that the facts here are not on all fours with the facts in that case. There the buildings were small, old, dilapidated dwelling houses which would soon have to be demolished, and the site was then ripe for development; in those circumstances it was held that the damages ought not to be limited to the depreciation in value of the houses on the site as they then stood, but might be extended to the diminution in value of the whole of the premises considered as one building site. In this case the facts are somewhat different, since No. 117 is still in good condition and likely to last several years longer, while as regards No. 119, the development of the site must be delayed for about fourteen years, until the expiration of the lease, unless in the meantime a surrender can be obtained. In principle, however, there seems to me to be no difference between granting damages in respect of a site immediately ripe for development and of a site which, though not immediately ripe, a prudent owner would develop on the first possible opportunity, provided, of course, that the prospect of development be not too remote.

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(1) 24 Q. B. D. 326, 329.

(2) [1912] 1 Ch. 291.

Having regard to these circumstances and following the decision in *Griffith* v. *Richard Clay & Sons* (1), I assess the damages to the combined sites of Nos. 117 and 119 Church Street at 100*l.* In order to avoid a new trial, in the event of this case being taken to the Court of Appeal and of that Court holding that, although damages might be awarded in respect of the diminution in value of the plaintiff's land as a site for the erection of commercial buildings, yet that such damages ought to be confined to the site of No. 117, and should not extend to the combined sites of Nos. 117 and 119, I assess the damage which the plaintiff has sustained in respect of No. 117, as a site to be developed for commercial purposes by itself, at the sum of 50*l.* This sum of 50*l.* is in addition to the 50*l.* already awarded by me for the immediate damage to the

(1) [1912] 1 Ch. 291.

house now standing on the site of No. 117, but under my judgment will not become payable, because it merges in the 100*l*. awarded by me in respect of the combined sites of Nos. 117 and 119.

In the result therefore I assess the total damages to which the plaintiff is entitled at the sum of 150*l*., made up of 50*l*. in respect of the immediate damage to No. 117, and 100*l*. in respect of the permanent damage to the combined sites of Nos. 117 and 119.

Solicitors: *Mills, Lockyer, Church & Evill; Ranger, Burton & Frost.*

H. C. H.

ALLSOPP *v.* ORCHARD.

[1921. A. 2451.]

EVE J.
1923
Jan. 24, 25;
Feb. 9.

Specific Performance—Contract to sell Rectory and Glebe—Negotiation—Reservations—Letters—Oral Evidence—Admissibility—Absence of concluded Agreement—Waiver by Vendor of Terms in his Favour—Statute of Frauds.

A contract by a rector for the sale of the rectory house and glebe land belonging thereto for 4500*l*. was pleaded as concluded in three specified letters. Before this the negotiations for the sale between the rector and his agent and the purchaser had been conducted at interviews and by letters on the footing that three acres of the glebe land should be reserved for the erection of a new rectory, and that certain fixtures should be taken by the purchaser. In defence to an action by the vendor for specific performance, the purchaser pleaded that there was no concluded agreement, and if there were there was no memorandum of it in writing to satisfy the Statute of Frauds. Plaintiff's counsel at the Bar waived the reservations in the vendor's favour, and was willing to convey the rectory house and all the glebe on payment of 4500*l*.:—

Held, that an agreement such as the vendor now asserted to be subsisting had never been contemplated by the parties, and was not the subject of the present action, which accordingly failed.

Held, further, that no question of waiver by the vendor of terms in his favour could arise where he had failed to establish any concluded agreement.

WITNESS ACTION.

The plaintiff, the Reverend John Allsopp, was incumbent of the rectory and benefice of Jacobstow, Cornwall. The following facts taken from the judgment of the Court were not in dispute. In 1920 the plaintiff, whose stipend as rector was wholly inadequate to the house he was called upon to maintain, was minded, if he could obtain the necessary consents, to sell the rectory house and premises standing upon some 2½ acres of land, and eighty-eight acres or thereabouts of the ninety-one acres of glebe, retaining three acres as a site on which he anticipated erecting a new and much smaller rectory. He informed the defendant, one of the churchwardens, of this, and explaining that he could not apply for the consents of the Bishop and others unless he already had an offer for the property, he invited the defendant to make him one. He further informed the defendant that the purchaser would have to take over the bath and some other fixtures in the house, and when the defendant asked for particulars of the boundaries of the area reserved for the new rectory the plaintiff replied: "Well I don't know; we shall arrange that later." The defendant made an offer of 3000*l.* in the first instance, and on being subsequently informed by the plaintiff that the Bishop was not satisfied of its sufficiency he increased it to 4000*l.* These offers were made prior to Messrs. Clutton going down from London, in February, 1921, to make an inspection and valuation. On the 28th of that month they reported fully to Messrs. Cowlard, Grylls, & Cowlard, of Launceston, the plaintiff's solicitors, and they on March 10 wrote to the defendant the first of the three letters relied upon by the plaintiff. It was in these terms: "Launceston, Cornwall. 10th March 1921. Mr. F. Orchard, Poulza, Jacobstow, Bude. Dear Sir, Jacobstow Rectory & Glebe: We are acting for the Rector who proposes to sell the Rectory and Glebe subject to the necessary consents to be obtained. The property has been valued by Messrs. Clutton, and as we understand that you would like to have an opportunity of purchasing privately we suggest that you should make an offer to us in writing, or come and see us within the next few days. Yours faithfully, Cowlard, Grylls, & Cowlard." That letter was alleged by counsel, on behalf of the plaintiff, to mark a new departure, and related to a different subject matter from that which had theretofore been discussed in that it was an invitation to the defendant to make an offer for the rectory and glebe, without reservation of any part of the latter as a site for the new rectory.

The day after he received that letter the defendant had an interview with Mr. H. L. Cowlard at Launceston, whereat Clutton's valuation was produced and referred to, and two days later he wrote this letter to Mr. Cowlard: "Poulza, Jacobstow. 14/3/21. To Mr. Cowlard. Dear Sir, With regard to Jacobstow Rectory and Glebe, I am prepared to give 4500*l.* for the property. As regards to [*sic*] fixtures, etc., no doubt we shall be able to arrange that later. I trust you will be able to manage transfer on my behalf and oblige. Yours respectfully, F. Orchard," and Mr. Cowlard by return of post replied: "Launceston, Cornwall, 15 March, 1921. Mr. F. Orchard, Poulza, Jacobstow, Bude. Dear Sir, I am obliged by your letter of the 14th inst., offering 4500*l.* for the property which I am authorised to accept on behalf of the Rector, subject to the necessary consents being obtained and I will at once apply for these. Yours faithfully, H. L. Cowlard."

The statement of claim set out the three letters above mentioned and claimed specific performance of the contract therein contained for the purchase by the defendant of the rectory and glebe for 4500*l.*, and, alternatively, damages in addition to or in lieu of specific performance.

It was pleaded in the defence that there was no concluded agreement, and reliance was placed on certain oral negotiations and letters which had passed between the parties as to the site which was to be reserved out of the glebe lands for the building of a new rectory. Further, that the plaintiff had expressed his desire to reserve a garden and to retain possession of the rectory house and grounds after completion of the purchase until the new rectory should be built, and had also proposed that the defendant should purchase certain fixtures. The defendant pleaded that no agreement was come to as to the position or boundaries of the reserved site or of the garden, or as to the date when vacant possession would be given. Alternatively, if any such agreement as was alleged was ever made, there was no note or memorandum sufficient to satisfy the Statute of Frauds, and it had been repudiated at an interview between the parties on April 25, 1921. Certain oral evidence outside the three letters was admitted by the Court de bene esse and a memorandum by Mr. Cowlard of April 19, 1921, was read.

Gover K.C. and *Bryan Farrer* for the plaintiff. The first question is whether there was a good contract within the Statute of Frauds. The three letters of March 10, 14, and 15 constitute a valid concluded agreement to sell the rectory and the whole of the glebe, subject to the necessary consents. These have been obtained, and that was the only condition to be fulfilled. It is true the prior negotiations between the parties were conducted on the footing that a site of some three acres which was undefined was to be reserved out of the glebe for the erection of a new rectory, and some fixtures not ascertained were to be taken over. But assuming there were these reservations, and the further reservation of a site for a garden alleged in the defence, these were all for the benefit of the vendor, and can be waived and are now waived at the Bar. That is in accordance with the authorities: *Smith* v. *Wheatcroft* (1); *Hawksley* v. *Outram* (2); *Morrell* v. *Studd and Millington* (3); and *North* v. *Loomes* (4); Fry on Specific Performance, 6th ed., pp. 75, 461. But no question of waiver arises unless the terms thus alleged by the defendant formed part of the contract. We submit they were negotiations only, and no written or oral evidence is admissible in this action, outside the letters establishing a concluded agreement, except evidence to identify the glebe. These letters constituted a new departure. If there was any alternative agreement it is not pleaded.

Clayton K.C. and *Wilfrid Greene K.C.* for the defendant. There was no concluded agreement, and if there were it did

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(1) (1878) 9 Ch. D. 223.
(2) [1892] 3 Ch. 359, 376.
(3) [1913] 2 Ch. 648, 660.
(4) [1919] 1 Ch. 378, 385.

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not include the whole of the contract. There was no sufficient memorandum within the Statute of Frauds. Parol evidence is admissible to ascertain the true subject matter of the contract. The only property intended to be sold was the rectory house and the glebe minus certain undefined reservations, in particular the site for a new rectory. This reservation was in the minds of both parties all through. The purchase was in fact repudiated at the interview of April 25, 1921, and all the interviews and documents showing what the real transaction was, are admissible in evidence: *Hussey* v. *Horne-Payne* (1); *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (2); *Bellamy* v. *Debenham* (3); *Perry* v. *Suffields, Ld.* (4) On the second point in the alternative there was no contract within the Statute of Frauds: *Williams* v. *Jordan.* (5) The contract was absolutely open; the "fixtures et cetera" alluded to in the letter of March 14, 1921, were not defined: *Price* v. *Griffith* (6), and the terms are too indefinite to be specifically enforced: Stroud's Judicial Dictionary, 2nd ed., vol. iii., p. 1688, where "Rectory" is defined. We submit that no question of waiver of conditions arises at all, as there was no concluded contract which could be waived in part: *Thuman* v. *Best* (7); *Wain* v. *Warlters.* (8) The parties were never ad idem and the plaintiff is now seeking to substitute one contract for another.

Gover K.C. in reply. The offer was unqualified and was accepted: *Simpson* v. *Hughes and Armstrong* (9); *Bonnewell* v. *Jenkins.* (10)

Cur. adv. vult.

Feb. 9. EVE J. This is a vendor's action for specific performance of an alleged contract to purchase the rectory house of Jacobstow in Cornwall and the glebe land belonging thereto for a sum of 4500*l.*

(1) (1879) 4 App. Cas. 311, 316.
(2) (1890) 44 Ch. D. 616.
(3) (1890) 45 Ch. D. 481.
(4) [1916] 2 Ch. 187.
(5) (1877) 6 Ch. D. 517.
(6) (1851) 1 D. M. & G. 80, 83.
(7) (1907) 97 L. T. 239.
(8) (1804) 5 East, 10; Smith's Leading Cases, 12th ed., vol. i., p. 361.
(9) (1897) 76 L. T. 237.
(10) (1878) 8 Ch. D. 70.

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The contract sued upon is to be found, according to the plaintiff's contention, in three letters dated March 10, 14, and 15, 1921. He maintains that except for the simple purpose of identifying the glebe no further evidence is necessary to establish his right to the relief he claims and that the documents which, subject to his counsel's objection, I have allowed to be read and the oral testimony which has been given de bene esse are not admissible to support the case sought to be made for the defendant that there never was a concluded contract but that the letters pleaded were mere incidents in the course of negotiations which ultimately failed to lead to any contract. I think each party has pushed his arguments as to the admissible evidence too far, the plaintiff in claiming to exclude evidence proving the circumstances subsisting when the alleged contract was brought about, and the defendant in asserting the admissibility not only of all documents passing between the parties and between the plaintiff and third persons but also of all conversations between the parties.

The facts I am about to state are not in dispute, nor is the admissibility of the evidence relating to them challenged. [His Lordship stated the facts as above set out and read the three letters.] These letters, it is argued, constitute a concluded contract to buy and sell the rectory and glebe, and no other evidence is admissible in this action to enforce that contract, except evidence to identify the glebe—a matter upon which there is no controversy between the parties. The first question I have to consider is whether this is such a contract as the plaintiff asserts. I do not think it is. It is to be borne in mind that down to the receipt of the first of these three letters the only subject matter of negotiation had been the rectory house and glebe subject to the reservation of an undefined area of about three acres for the new rectory and to the defendant taking over certain unascertained fixtures in the house. If this letter really was intended as an invitation to bid for something different, it certainly does not disclose the fact. But, in my opinion, it never was so intended, and Mr. Cowlard must have appreciated when he received the offer of the 14th that defendant had not so read it. I arrive at these conclusions on two grounds. In the letter of March 10, 1921, after stating that the rector proposes to sell the rectory and glebe the writer goes on to say: "The property has been valued by Messrs. Clutton"—what property? Clearly the property for which the defendant is being invited to make an offer. The negotiations down to this date having proceeded on the footing that the subject matter did not include the whole of the glebe and the invitation of March 10 not disclosing to the would-be purchaser any intention on the vendor's part to alter the subject matter, I am left in doubt whether the vendor really did contemplate selling more than what, down to that time, had been the only subject of negotiation. To assist in solving this doubt, I can, in my opinion, properly refer to Clutton's valuation, and when I do so I find that the property they valued was not the rectory and glebe but the rectory house and the glebe less three acres, and that the valuation proceeded on the footing that the rector should retain the use and occupation of the rectory house and premises for two years from the date of sale and should have the right to lay on water for the new rectory house from the pipe supplying the present house.

With this valuation before him it is impossible to believe that the writer of the letter of March 10 was inviting the defendant to make an offer for the rectory and all the glebe free from all reservations, or indeed for anything more than had been theretofore discussed.

And that the defendant so understood it is in my opinion demonstrated by the language of his offer. In the sentence about "fixtures, etc."—irrelevant if he had read the letter of the 10th in the sense argued for by the plaintiff—he is obviously referring to the only two matters, the fixtures and the boundaries of the retained area, about which the rector had spoken but upon which nothing definite had been postulated, still less agreed.

I am satisfied without resort to any evidence outside these letters except the valuation that there never was, and that no one ever intended or contemplated that there should be,

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a contract of the nature sued upon in this action, that is to say, a contract—I am reading from the writ—"for the sale by the Plaintiff to the Defendant of the Rectory of Jacobstow and the Glebe land belonging thereto."

That being so the action in my opinion fails. It is true that counsel on behalf of the plaintiff expressed his willingness to treat the contract as one relating to the property valued by Cluttons, and offered at the Bar to abandon and release all reservations and stipulations in favour of the vendor and on payment of 4500*l*. to convey to the purchaser the rectory house and all the glebe. He contended that in the face of this offer the purchaser could not resist an order for specific performance, seeing that the vendor was modifying the contract solely to his own disadvantage and to the advantage of the purchaser. There are, I think, several answers to that argument, but one will suffice. The purchaser has come here to try the issue whether or not he ever entered into the contract sued upon. The action was not brought to enforce such a contract as Mr. Gover says he is now willing to treat as subsisting, and no one's attention has been directed to considering whether or not such a contract was ever made. When the defendant has once established his defence that he never contracted as alleged and that there never existed a contract in the terms of the one sued upon, it is not competent for the vendor or the Court to hold him to some other alleged contract not the subject of the action and which he may equally be able to prove he never entered into. There is really no analogy between a case of this kind, where the vendor has failed to prove a concluded contract, and the cases in which a vendor having established the existence of the contract is at liberty, if he be so disposed, to take less than he is entitled to insist upon when he comes to have the contract specifically enforced.

I wish to add this, that had it been necessary to consider the evidence tendered and accepted de bene esse I should certainly have admitted that of the interview between the defendant and Mr. Cowlard on March 12 and the memorandum in Mr. Cowlard's handwriting of April 19. The interview—

suggested in the concluding words of the letter of March 10—was held for the purpose of explaining amongst other things what the rector was selling and the minimum price which could be accepted having regard to the valuation, and the evidence of what took place thereat could not, in my opinion, properly be excluded in prosecuting the inquiry whether the two letters immediately following on that interview constitute a final and complete agreement between the parties, or only an agreement as regards one point—namely, the price. Upon this inquiry the subsequent memorandum is of vital importance, since it shows conclusively that a month after the letters had been written there were, from the vendor's point of view, still outstanding for negotiation and settlement at least half a dozen material and essential terms.

I do not comment on the evidence because I only heard that given by one side, plaintiff's counsel—consistently with his submission that no oral evidence was admissible—declining to put the plaintiff or Mr. Cowlard into the box. I do not think it is necessary for me to consider whether any of the other evidence was admissible, and accordingly it only remains for me to dismiss the action with costs.

Solicitors for plaintiff: *May, Chilver, May & Deacon, for Cowlard, Grylls & Cowlard, Launceston.*

Solicitors for defendant: *Hedley Norris & Co., for Peter, Peter & Sons, Launceston.*

G. M.

SARGANT J.
1923
Jan. 11, 12.

In re WHITBURN.

WHITBURN *v.* CHRISTIE.

[1922. W. 2149.]

Will—Gift of Heirlooms to accompany Real Estate—Devise of Real Estate—Subsequent Disposition of Real Estate by Deed—Validity of Gift of Heirlooms.

By his will dated September 28, 1900, a testator gave and bequeathed all his household plate, furniture, linen, china, pictures, books and other household effects which should at his death be in or about his mansion house to trustees in trust to permit his wife to have the use and benefit thereof during widowhood and afterwards in trust "to permit the same to be held and enjoyed as heirlooms by the person or persons for the time being entitled to the said . . . . mansion house under the limitations herein declared and contained, or as nearly as the rules of law and equity will permit, but so that the said heirlooms shall not vest absolutely in any person hereby made tenant in tail by purchase of the said . . . . mansion house unless he or she shall attain the age of 21 years." The testator then devised his estate and mansion house in strict settlement. In 1910, the testator executed two voluntary deeds, as a result of which the estate and mansion house were settled to uses differing somewhat from those of the devise in the will, which was thereby rendered inoperative:—

Held, that the trusts of the chattels contained in the testator's will were not affected or rendered inoperative by the dispositions by voluntary deed of the real estate.

Martineau v. *Briggs* (1875) 23 W. R. 889 and *In re Towry's Settled Estate* (1889) 41 Ch. D. 64 distinguished.

Darley v. *Langworthy* (1774) 3 Bro. P. C. 359 applied.

ADJOURNED SUMMONS.

By his will dated September 28, 1900, Charles William Soper Whitburn gave and bequeathed all his "household plate, furniture, linen, china, pictures, books and other household effects which shall at my death be in or about my capital messuage or mansion house called Addington Park and also in and about No. 16 Ennismore Gardens or belonging or appropriated thereto respectively" to his trustees in trust to permit his wife to have the use and benefit thereof during widowhood and afterwards "in trust to permit the same to be held and enjoyed as heirlooms by the person or persons for the time being entitled to the said capital messuage or mansion house under the limitations herein declared and

SARGANT J.

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WHITBURN, *In re.* WHITBURN *v.* CHRISTIE.

contained or as nearly as the rules of law or equity will permit but so that the said heirlooms shall not vest absolutely in any person hereby made tenant in tail by purchase of the said capital messuage or mansion house unless he or she shall attain the age of twenty-one years but upon the death of such person under that age shall devolve to the person or persons who shall thereupon become entitled to the said capital messuage or mansion house under the limitations aforesaid." The testator then devised and bequeathed the Addington Park estate unto his trustees in trust to permit his wife to occupy and enjoy the capital messuage or mansion house during widowhood, and in further trust to stand possessed of the residue of the Addington Park estate and subject to the aforesaid trust in favour of his wife of the whole of the said estate to the use of his son Charles W. S. Whitburn during his life without impeachment of waste and from and after his decease to the use of his first and other sons successively according to seniority in tail general with remainder to the use of his first and other daughters successively according to seniority in tail general with remainder to the use of the testator's daughter Mary F. Christie during her life without impeachment of waste and from and after her death to the use of her first and other sons successively according to seniority in tail general with remainder to the use of her first and other daughters successively according to seniority in tail general with divers remainders over. Then followed a gift of residuary real and personal estate.

During 1910 the testator executed two voluntary deeds, as a result of which the Addington Park estate, including the mansion house, was settled to uses differing somewhat from those of the devise in the will which was thereby rendered inoperative.

The testator died in 1911 and his widow died in 1921. This summons was taken out in June, 1922, by Charles W. S. Whitburn and it raised (inter alia) the question whether and to what extent the trusts declared by the will of the testator concerning his household effects at Addington Park and No. 16 Ennismore Gardens (to take effect after the death of his widow) were affected by the dispositions made by the two voluntary deeds.

Ashworth James for the plaintiff. The gift of chattels contained in the testator's will is valid and effective. Though given by referential trusts the effect is to give them to personæ designatæ as though the trusts were set out at length, following the uses of the realty so far as the law allows: *Martineau* v. *Briggs* (1); *In re Towry's Settled Estate.* (2) In the latter case the Court of Appeal took the view on the construction of the particular will that the heirlooms were so settled to accompany the realty that the general principle of *Martineau* v. *Briggs* (1) did not apply. Here however that general principle applies. Compare *Agnew* v. *Pope* (3); *Darley* v. *Langworthy* (4); *Baroness Wesselenyi* v. *Jamieson* (5); *In re Fowler* (6); *In re Cornwallis.* (7)

H. H. King for a trustee under the voluntary deeds.

Bryan Farrer for Mrs. Christie adopted the plaintiff's argument.

Church for Mrs. Christie's son and grandson also adopted the plaintiff's argument.

C. A. Bennett for persons entitled to residue. The authorities cited really divide into two classes, first, where a gift is made by reference to another gift in a testator's will, which is revoked afterwards; and secondly, when the gift by reference to which other property is given becomes inoperative by reason of some act of a third party. An example of the second class is *Baroness Wesselenyi* v. *Jamieson.* (5) The first class is much more directly in point, and the principle underlying the decisions in these cases is that when a gift is made in a will by reference to another and this other gift is revoked, then if the intention is that both the gifts should go together the revocation of the one effects a revocation of the other also; otherwise, if the two gifts can be treated as completely independent: see Jarman on Wills, 6th ed., pp. 183, 184. If the gift by referential trusts is made as incident or accessory to the other, the principal, gift then the revocation of the principal gift carries with it the revocation of that which is accessory to it: *Martineau* v. *Briggs* (1); *In re Towry's Settled Estate* (2); see also *Evans* v. *Evans*. (3) When the gift is of chattels, there is a much greater probability that they are intended to be enjoyed with the realty. The language of the gift of the chattels here shows clearly that they are an accessory to the gift of Addington Park and *In re Towry's Settled Estate* (2) applies. There is, it is true, the distinction here that the principal gift is not varied by codicil. When it is the accessory gift is treated as modified also. Here however the devise of Addington Park is adeemed by reason of the voluntary deeds and the gift of the chattels is adeemed also.

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(1) 23 W. R. 889.

(2) 41 Ch. D. 64.

(3) (1857) 1 De G. & J. 49.

(4) 3 Bro. P. C. 359.

(5) [1907] A. C. 440.

(6) [1917] 2 Ch. 307.

(7) (1886) 32 Ch. D. 388.

[*Bryan Farrer* referred to *Darley* v. *Langworthy*. (4)]

There no reason is given for the decision.

[SARGANT J. In cases where the will is varied by codicil, the Court has to ascertain the testamentary intention of the testator from the two instruments taken together. When the gift in the will is affected by a voluntary deed, the case more nearly resembles those where the principal gift is rendered inoperative by the act of some one other than the testator.]

In all the cases belonging to that class, the act affecting the bequest in the will was done after the will became operative: *Baroness Wesselenyi* v. *Jamieson* (5); *In re Fowler*. (6) On the language of the will here the gift of chattels must fail because there was nobody who became entitled under the will to the mansion house.

[SARGANT J. The position was very similar in *Darley* v. *Langworthy*. (4)]

No reasons for that decision were given and the principle governing such cases has been clearly enunciated in the later authorities.

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(1) 23 W. R. 889.
(2) 41 Ch. D. 64.
(3) (1849) 17 Sim. 86.
(4) 3 Bro. P. C. 359.
(5) [1907] A. C. 440.
(6) [1917] 2 Ch. 307.

[He referred also to *Lord Carrington* v. *Payne* (1) and Jarman on Wills, 6th ed., p. 396.]

SARGANT J. The question which I have to determine is whether the gift in remainder made by the will of the testator of his household furniture, plate, china, linen, pictures, books, and other household effects which at his death were in or about his mansion house of Addington Park, was affected by the disposition made by the two documents executed after the date of the testator's will, and before his death. [His Lordship stated the facts and continued :] The effect of the two voluntary deeds was to take the Addington Park estate entirely outside of the operation of the will and to render the will ineffective as regards it. On that the question has arisen whether the result of the devises of the real estate having become inoperative by reason of the execution of the voluntary deeds is also to render the will inoperative on the chattels which were directed by the will to be held to be enjoyed by the persons entitled to the mansion house under the limitations declared in the will. The matter has been very fully argued, and I think that no useful purpose will be served by my reserving judgment.

A number of cases have been cited dealing with very similar questions, but they seem to me to differ in one vital respect. In each of these there have been similar gifts by will and a subsequent alteration occasioned not by a deed executed by the testator but by a codicil. The cases to which I refer in particular are *Martineau* v. *Briggs* (2), a case in the House of Lords, and *In re Towry's Settled Estate* (3), a case in the Court of Appeal. In *Martineau* v. *Briggs* (2) there was a devise of freehold estates in strict settlement, and then a corresponding devise of the copyhold estates and leasehold estates "upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations as, regard being had to the different natures of the respective properties, will best or nearest correspond with the uses, trusts, intents, purposes, powers, provisoes, and declarations hereinbefore expressed and contained of and concerning the freehold manors, hereditaments, and premises hereinbefore devised." Then by a codicil there was an alteration of the uses declared with regard to the freehold estates. The House of Lords held (affirming the decision of Wickens V.-C.): "That although it was probable from the circumstances that the testator intended his copyhold and leasehold estates to follow the limitations of his freeholds as declared in the codicil, still, as there were no words in the codicil to give effect to such an intention, the Court would not supply them, and that the copyhold and leasehold estates passed according to the trusts originally declared in the will." In construing the will Lord Cairns based his judgment on the view that although the leaseholds and copyholds were in terms devised upon trusts corresponding to the freeholds, yet that was merely a short method of repeating with regard to those estates the use or uses corresponding to those which had been declared concerning the freehold estates. He thought that there was no expression in the will which necessarily united the enjoyment of the copyholds and leasehold estates with that of the freehold estate. That being so, there was no reason to construe the codicil as intending to do more than the codicil was expressed to do—namely, to alter the limitations of the will with regard to the freehold property. That was the effect of that case and the reasoning on which it was decided.

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(1) (1800) 5 Ves. 404.
(2) 23 W. R. 889, 890.
(3) 41 Ch. D. 64.

On the other hand, in *In re Towry's Settled Estate* (1) there was a gift very similar to the gift in the present case of chattels to be enjoyed by the persons who should for the time being be entitled to a certain mansion house which had been settled in strict settlement; and the devolution of the settled estate was afterwards altered by a codicil. The Court came to the conclusion that there was such an intention shown by the will to unite the enjoyment of the chattels with the ownership

(1) 41 Ch. D. 64.

of the real estate that the total intention to be inferred from the will and codicil together was to alter the trusts of the chattels in a manner corresponding with the express alteration of the uses of the freehold hereditaments in connection with which they were to be enjoyed. Here, if what the testator had done by his two voluntary deeds had been effected by a codicil, I am inclined to think that I should have decided that the result of the total testamentary disposition would have been in accordance with the decision in *In re Towry's Settled Estate* (1); because I should have thought that the testator having made the disposition that he did of his real estate, and having made the corresponding disposition of his personal estate with an express, or sufficiently indicated intention to unite the enjoyment of the one with the other, must, when he came by his codicil to alter the disposition of his real estate, have intended to make a corresponding alteration of his disposition of his personal chattels. But, in fact, something very different from that has happened. The testator made the alteration in question, not by a codicil, not by a document which was capable of altering his testamentary disposition at all, but by a document inter vivos.

That being so, I am faced with a problem different from that which had been solved either by the House of Lords in *Martineau* v. *Briggs* (2), or by the Court of Appeal in *In re Towry's Settled Estate*. (1) The problem is not what was the ultimate testamentary disposition of the testator, but what was the effect of a deed inter vivos on a testamentary disposition that had been previously made. For this purpose, it seems to me that no importance is to be attached to the fact that the alteration was made under these voluntary deeds by the testator himself, but that the subject must be treated exactly as if the alteration had been made by somebody other than the testator; that is by somebody who might have had, for instance, an overruling power of appointment over the property. I have been pressed by Mr. Bennett with the

(1) 41 Ch. D. 64.

(2) 23 W. R. 889.

argument that the real estate must be considered as the principal subject matter dealt with by the testator, and that the personal chattels were to be considered as an accessory subject matter bequeathed for the purpose of being enjoyed together with the real estate. But, in my judgment, that does not determine the question in favour of those who claim that the gift of the accessory subject matter has been revoked because the gift of the principal subject matter has been revoked. The two gifts are gifts which though interdependent are in fact separate gifts. I have to construe the language employed by the testator with reference to the chattels. The testator bequeathed them "In trust to permit the same to be held and enjoyed as heirlooms by the person or persons for the time being entitled to the said capital messuage or mansion house under the limitations herein declared and contained." Does that mean that they were to be enjoyed by the persons named expressly or by reference "under the limitations herein declared and contained," or that they were to be enjoyed by the persons entitled under the limitations not merely by virtue of the will alone but also by virtue of any other document or fact affecting the devolution of the property? In my judgment, on the ordinary principles of construction of wills, it is the former interpretation that has to be adopted.

It appears to me that the cases which have been cited, *Baroness Wesselenyi* v. *Jamieson* (1), *In re Fowler* (2), and *In re Cornwallis* (3), all point in that direction. They are not precisely similar to this case for the reason that they deal with facts which happened after the death of the testator and after the will had become operative; but, in my judgment, that is not a sufficient reason why the same principle should not be applied. Moreover, there is one case of the highest authority which, as it appears to me, is precisely in favour of the view to which I am coming. That is the case of *Darley* v. *Langworthy*. (4) In that case, one Vincent Darley had devised lands to his wife for life, with remainder in settlement.

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(1) [1907] A. C. 440.

(2) [1917] 2 Ch. 307.

(3) 32 Ch. D. 388.

(4) 3 Bro. P. C. 359, 360.

Besides the freehold estates, he was entitled to certain property called Bonds Walls for a long term of years and also to certain chattels. By his will, after reciting that he was entitled to a messuage or tenement called Bonds Walls, lying contiguous and adjoining his freehold estate called Battens for the remainder of a term of 900 years, he directed his trustees and executors "to grant and assign the same tenement unto some person or persons in trust, if it could or might be done by any ways or means whatsoever, that the same might go unto, and always during the remainder of the said term be enjoyed by the owner or possessor of Battens for the time being, and not to be separated therefrom, as long as the said term should last; and the testator gave to his said wife, the appellant, the rents, issues, and profits of all his chattel estates for so many years as she should live, if the terms therein so long continued, and she should choose to reside at Battens aforesaid. And he also gave to his wife, and Richard Welsh, all the rest of his goods, chattels and personal estate"; and then he appointed executors. After the date of his will the testator suffered a recovery of the real estate called Battens. The first question that arose was whether the recovery that he had suffered was a revocation of his will so far as Battens was concerned; and it was decided by the Court of Common Pleas that it was. So that there was in that case almost precisely the same set of circumstances as occurred here—namely, a devise of real estate in strict settlement, an express annexation of the chattels and leasehold term to the real estate, obviously as an accessory to the principal, and a subsequent cancellation or revocation of the will, so far as the real estate was concerned, not by a testamentary revocation, but by an act inter vivos. That being so, the question arose whether the revocation of the will effected as regards the real estate by the recovery, also operated to revoke the gift of the chattels and the personal estate. That question went to the House of Lords on appeal from the Court of Chancery. The argument is very clearly put (1) in favour of the revocation of the chattel interests: "The devise, therefore, of Battens, the principal, being revoked by the recovery, the bequest of the chattel interests, the accessories must fall with it; and there would consequently have been an intestacy as to them as well as Battens, but for the residuary bequests, under the trusts of which the respondent was become entitled to them, by having attained his age of 21." Unfortunately, no reasons are given for the decision of the House of Lords, but the result was: "It was ordered and adjudged that so much of the decrees therein complained of, as declared, that the bequest of the leasehold estate called Bonds Walls, and of all the testator's chattel estate, and the use of his household goods, plate, and furniture at Battens, and his live and dead stock, became consequentially revoked by the common recovery suffered of Battens; and the directions given by the decree, pursuant to such declaration, should be reversed: and it was declared that the appellant was entitled to the benefit of the said bequests, discharged from the condition of living at Battens, which the common recovery had put out of her power."

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(1) 3 Bro. P. C. 364.

That is a decision of the highest authority which, in my judgment, completely covers the present case. It shows that, although the bequest of chattels to be enjoyed together with the real estate may be of the nature of an accessory gift to be enjoyed with the principal gift, yet if the revocation of the principal gift is made by the voluntary act of the testator himself, that act not being testamentary, the result will be that the bequest of the accessory will not be revoked together with the devise of the principal, but will stand.

That being the state of the authorities, I must declare that the trusts declared by the will concerning the chattels in question were not revoked or affected by the disposition made by the two voluntary documents, and that the chattels are still held upon the trusts declared by the will.

Solicitors: *Bischoff, Coxe, Bischoff and Thompson*; *James & James*; *Bird & Bird.*

H. C. G.

P. O. LAWRENCE J.

1922
Dec. 8, 14.

1923
Jan. 17.

DIBBLE *v.* WILTS AND SOMERSET FARMERS, LIMITED.

[1922. D. 1394.]

Industrial and Provident Society—Rules—Ultra vires—Liability of Members to take additional Shares—Power to increase Members' Liability—Principle as to Liability of Members of Limited Companies applied to Members of Industrial and Provident Societies—Contract between Members and Society —Industrial and Provident Societies Act, 1893 (56 *&* 57 *Vict. c.* 39).

The contract of membership in a society registered under the Industrial and Provident Societies Act, 1893, carries with it the right on the part of the society to make and alter its rules determining (inter alia) the amount of interest (not exceeding 200*l.*) in the shares of the society which any member may hold. But that right is subject to the fundamental principle governing the constitution of the society. Therefore, as there is a provision in the Act of 1893, which has its counterpart in the Companies (Consolidation) Act, 1908, that in the winding up of such a society no contribution can be required from any member exceeding the amount unpaid on the shares in respect of which he is liable, the principle laid down in *Ooregum Gold Mining Co. of India* v. *Roper* [1892] A. C. 125 and *Welton* v. *Saffery* [1897] A. C. 299 with regard to the limit of the liability of members of limited companies applies to the liability of members of industrial and provident societies; and applying, mutatis mutandis, the principle of *Bisgood* v. *Henderson's Transvaal Estates* [1908] 1 Ch. 743, 759, which was applied to a limited company, to a society registered under the Industrial and Provident Societies Act, 1893, any attempt to define the constitution of such a society in such a manner as that a member should be, in some event, liable for any larger sum than the amount, if any, unpaid on his shares in respect of which he is a member, is a breach of the Act of 1893, and is ultra vires; and any rule, whether original or amended, which seeks to impose on a member the alternative of accepting liability for a larger sum or of being dispossessed of the status of a member is ultra vires.

Therefore, where a member who joined a society registered under the Act of 1893, under an original rule which required him to take up 100 1*l.* fully paid shares in the society in respect of the acreage farmed by him, was subsequently required (in spite of s. 4 (*a*) of the Act of 1893, restricting the interest of a member in the shares of a society to 200*l.*) to comply with the amendments afterwards made to the original rule, by which five shares were required in place of one share, and the nominal value thereof was reduced to 6*s.* 8*d.* and a 5*l.* share was substituted for the five shares, and to take up and pay for 425 additional shares (after making allowance for the 100 shares of which he was then the registered holder) or in default thereof to forfeit his shares:—

Held, that the rule, both in its original form and as amended, was ultra vires and void, because it purported to impose a liability on the member, in certain events, to acquire further shares in the society's capital.

There is no difference in principle between a case where it is sought to make a member liable to pay more than the nominal amount of any shares of which he might for the time being be the holder and a case where it is sought to compel him to acquire additional shares: *Manners* v. *St. David's Gold and Copper Mines* [1904] 2 Ch. 593 applied.

Further, that the reduction in the nominal value of the shares, being in furtherance of a scheme for imposing upon the member a liability for a larger sum than the amount unpaid upon his shares, for the purpose of evading s. 4 (*a*) of the Act of 1893, was ultra vires and void. Further, that the rules of the society did not constitute or involve any contract as between the member and the society to take up from the society or pay to the society for any shares in addition to the shares held by him.

MOTION FOR JUDGMENT.

The Wilts and Somerset Farmers, Ld., was registered in 1910 as a society, under the Industrial and Provident Societies Act, 1893, with the object (amongst others) of carrying on the business of wholesale and retail dealers in dairy farm and garden produce.

In June, 1920, the plaintiff, who at all material times was the occupier of a dairy farm at Burnley in the county of Somerset containing 219 acres and the owner of 35 dairy cows, became a member of the society, and subscribed and paid for 100 1*l.* fully paid shares in the society.

The rules of the society in force at the time when the plaintiff became a member were, so far as material, as follows:—

(6.) Shares shall be transferable, but not withdrawable. They shall be of the nominal value of 1*l.*

(12.) Individual members shall hold at least one share for every 20 acres or fraction of 20 acres farmed by them, up to 500 acres, and at least one share for every 40 acres or fraction of 40 acres above 500 acres. . . . Milk retailers shall hold at least six shares for every churn of 17 gallons retailed daily by them.

(13.) The total number of shares held by any member shall not exceed two hundred pounds in nominal value.

(18.) No transfer of shares shall be valid unless the Committee's consent has been obtained thereto.

(23.) If by transfer or otherwise, the number of shares

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held by a member becomes less than the number required by rule 12, to be held by him, the amount paid up on the shares shall be repaid and the shares cancelled and the member shall cease to be a member.

(64.) The rules may be amended by resolution of a three-fourths majority at a special general meeting, and no amendment shall be valid until registered.

The rules were altered or purported to be altered by an amendment which was registered at the Registry of Friendly Societies on November 14, 1921, and such amendment was, so far as material, as follows :—

Rule 12 : Rescind the whole rule and substitute therefor : Individual members shall hold at least five shares for every 20 acres or fraction of 20 acres farmed by them up to 500 acres and at least three shares for every 40 acres or fraction of 40 acres above 500 . . . . milk producers shall hold shares on the above acreage basis or shall hold at least five shares for every dairy cow owned by them whichever shall be the greater number of shares.

Rule 23, line 4 : Strike out the word " shall " and substitute " may at the discretion of the Committee."

By an amendment registered on December 21, 1921, the nominal value of the issued fully paid shares was reduced to 6*s*. 8*d*. by cancelling the sum of 13*s*. 4*d*. on each share.

A further alteration was registered on March 25, 1922, and so far as material was as follows : Rule 12, as amended November 14, 1921 : " Strike out the words 'five shares' in the two places in which they occur and substitute therefor 'shares of the nominal value of 5*l*.' "

Each of the amendments was duly passed by a resolution of a three-fourths majority of the members at a special general meeting of the society in accordance with rule 64.

The society having required the plaintiff to take up and pay for 425 additional shares, being the number required to be held by him under rule 12, as altered in the manner above stated, after allowing for the 100 shares of which he was then already the registered holder, the plaintiff refused to take up and pay for those additional shares and challenged the right of the society to compel him so to do. The plaintiff accordingly commenced this action in which he claimed (1.) a declaration that rule 12 as altered by the respective amendments was ultra vires, and not binding on him, or, in the alternative, that rule 12, in its original form, was invalid and not binding upon him; (2.) an injunction restraining the society from putting in force against the plaintiff rule 12, as altered; (3.) a declaration that the society had no power to reduce its capital as stated or at all; and (4.) a declaration that the rules of the society did not constitute or involve a contract between the plaintiff and the society to take up and pay for any shares in addition to the shares held by him.

By arrangement between the parties and with the sanction of the Court the action was set down for legal argument without witnesses, as the facts were not in dispute, and came on upon motion for judgment.

D. D. Reid and *Vaisey* (*Clauson K.C.* with them) for the plaintiff. Rule 12, as amended, is ultra vires the society. Any rule which purports to increase the liability of a member without his consent is ultra vires. There is some limit to the power of such a society as this to alter its rules: in *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society* (1), a rule was held to be illegal as being in restraint of trade and therefore ultra vires. But a rule may also be ultra vires, as an infringement of the provisions of the Industrial and Provident Societies Act, 1893. The effect of rule 12, as amended, is that a member cannot withdraw from the society, but is forced either to take up new shares or to forfeit his shares. That is contrary to statute law and illegal. In respect of the limitation of the liability of members, the law affecting industrial and provident societies is similar to the law affecting limited liability companies: the Act of 1893 requires that the word "limited" shall be the last word in the name of every society registered under the Act: see s. 5, sub-s. 5. It provides that the registration of a society shall render it a body corporate with limited

(1) [1919] A. C. 548.

liability: see s. 21; and, in the winding up of such a society, it is provided that no contribution shall be required from any individual, society or company exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member: see s. 60, cl. (*d*). Those provisions have their counterparts in ss. 2, 16 and 123 of the Companies (Consolidation) Act, 1908. No like provisions are to be found in the Acts relating to friendly or building societies. The principles, therefore, applicable to the liability of members of a limited company under the Companies Acts are likewise applicable to the liability of members of an industrial and provident society. The rules by which the share qualification of a member was increased and the nominal value of the shares was reduced amounted to a device to compel fully paid shareholders to contribute further capital or else to forfeit their interests in the society, and were ultra vires: *Manners* v. *St. David's Gold and Copper Mines.* (1) As regards limited companies under the Companies Acts, it is well settled that, although the articles of association become in effect a contract under seal by each member, yet they cannot diminish or affect any liability created by the express terms of the statute: *Welton* v. *Saffery* (2) per Lord Herschell; similarly in the case of this society, its rules are subject to the provisions of the Act of 1893. A member cannot be made liable for a larger sum than the amount unpaid on his shares, and any attempt to render him so liable by imposing on him the alternative of accepting liability for a larger sum or being dispossessed of his status of a member upon terms which he is not bound to accept is ultra vires: *Bisgood* v. *Henderson's Transvaal Estates.* (3) Rule 12, even as originally framed, is bad for uncertainty, as it introduces a sliding scale, and the amended rule is no less uncertain. Even if the rule is valid, there is no contract binding a member to undertake an increased liability. In the case of a director's liability to take qualification shares, that liability is based upon an agreement between him and the

(1) [1904] 2 Ch. 593.
(2) [1897] A. C. 299, 315.
(3) [1908] 1 Ch. 743, 759.

company inferred from his acceptance of the office to serve on the terms as to qualification or otherwise contained in the articles: The articles do not constitute the contract, they only contain the terms upon which the director has agreed to serve: *In re Wheal Buller Consols* (1); *Isaac's Case* (2); and *Ex parte Lord Inchiquin.* (3) If a member in the present case contracted to take new shares he could only so contract as bound by the rules by virtue of s. 22 of the Act of 1893; but rule 12 as amended seeks to impose an additional liability on a member which the statute and the authorities prohibit; and there exists no difference, in principle, between a case where it is sought to make a member liable to pay more than the nominal amount of a share of which he is the holder and a case where it is sought to compel him to acquire additional shares; that is to say, a member cannot be made liable to pay more than the amount which is unpaid on his shares. The rule, therefore, is ultra vires, and not binding on the plaintiff.

Luxmoore K.C. and *H. St. John Field* for the defendant society. Rule 12, in its original form and as amended, is valid and binding. The principle of "limited liability" was created by statute law. If the society were governed by the Companies (Consolidation) Act, 1908, the rule would be ultra vires; but the society is governed entirely by the Industrial and Provident Societies Act, 1893: and the cases relating to limited companies under the Companies Acts are not applicable to societies registered under the Act of 1893, which Act alone is to be regarded in reference to those societies. In *Brownlie* v. *Russell* (4) Lord Selborne said, with reference to a building society: "This is not a joint stock company; still less is it a common law partnership; but it is a society of a special kind, formed and regulated under particular Acts of Parliament for special purposes."

The Act of 1893 provides by s. 4 (*a*) that no member shall have or claim any interest in the shares of the society exceeding 200*l*. The object of that was to prevent any member from obtaining a controlling interest; the limit having reference to the nominal amount of the shares for the time being of a member. The society is to be governed by rules which must provide for such matters as are specified in the Second Schedule: s. 10 of the Act. Some of those matters include: the mode of holding meetings, the scale and right of voting, and of making, altering or rescinding rules; the determination of the amount of interest, not exceeding 200*l.* in the shares which a member may hold. The protection afforded to members by s. 53 of the Companies Act of 1908, in case of the shares being reduced, is not afforded by the Act of 1893 to members of societies registered under that Act. By s. 22 of that Act a member is bound by the rules to the same extent as if he had subscribed his name and affixed his seal thereto and had covenanted to conform thereto. When the plaintiff joined the society he did so with full knowledge that he would be bound by the existing rules and any new rules which might be made under the powers given by the Act and rule 64 of the society to a three-fourths majority. Rule 12 is not void for uncertainty: a member's interest in the society is to correspond with the amount of business he carries on. It is only necessary to ascertain the number of acres he is farming and of cows he owns. It is not beyond the powers of a society to make a rule by which a member shall be liable to pay more in respect of his shares or to take up and pay for additional shares, when that member has on joining the society agreed to be bound by the rules, and he is always at liberty to withdraw. Decisions with reference to friendly and building societies are also applicable to industrial and provident societies: in *Rosenberg* v. *Northumberland Building Society* (1) a rule was altered so as to make an advanced member liable for losses of the society and (notwithstanding that the rules in force at the date of the mortgage did not render an advanced member so liable) the member was not allowed to redeem, unless he contributed towards the losses. In that case the advanced member had contracted to pay

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(1) (1888) 38 Ch. D. 42.
(2) [1892] 2 Ch. 158.
(3) [1891] 3 Ch. 28.
(4) (1883) 8 App. Cas. 235, 248.

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(1) (1889) 22 Q. B. D. 373.

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such an amount as should be due from him under the rules in force at the time when the payment has to be made and was bound by the alteration in the rules: see also *Wilson* v. *Miles Platting Building Society.* (1)

[*Clauson K.C.* Under s. 14 of the Building Societies Act, 1874, the liability of a member of a building society in respect of any share upon which an advance has been made is limited to the amount payable thereon under his mortgage or under the rules of the society.]

There is no limitation to the power reserved of altering the rules, so long as such alteration relates to the internal rights and management of the society: *Strohmenger* v. *Finsbury Permanent Investment Building Society.* (2) There, in order to provide for a loss of part of the society's capital, the shares were reduced: the rules were altered so as to affect members who contracted with the society under rules which expressly provided for repayment of the subscriptions, and those members were held to be bound by the altered rules. Where the only contract between the society and a member is the original contract under which he became a member, and the contract provides for alterations of the rules, he is bound by any subsequent alteration, even though the effect of such alteration is to deprive him of a benefit which he possessed at the time the alteration was made: *Smith* v. *Galloway.* (3)

The decisions in cases decided under the Companies Acts do not apply to societies governed by the Industrial and Provident Act, 1893. The case of a society registered under that Act depends entirely on the rules of the society and the powers of the members to bind each other. In *Bisgood's Case* (4) and in *Manners* v. *St. David's Gold and Copper Mines* (5) the object of the scheme was to deprive a member of the protection afforded him by s. 161 of the Companies Act, 1862, by imposing upon him a further liability or to forfeit his interest in the company. The plaintiff is bound to take the additional shares; he agreed on joining the society to be bound

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(1) (1887) 22 Q. B. D. 381n.

(2) [1897] 2 Ch. 469, 479.

(3) [1898] 1 Q. B. 71.

(4) [1908] 1 Ch. 743.

(5) [1904] 2 Ch. 593.

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by the rules, which require him to take those additional shares to qualify him as a member. If he refuse to take them up within a reasonable time he may be compelled to do so: *Ex parte Lord Inchiquin.* (1)

Clauson K.C. in reply. It is plainly provided by s. 60 (*d*) of the Act of 1893, that "no contribution shall be required from any individual . . . . exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a past or present member." The principle laid down in *Bisgood's Case* (2), applicable to a member whose liability is limited by s. 123, sub-s. 1, cl. (iv.), of the Companies (Consolidation) Act, 1908, is equally applicable to this society, the liability of whose members is limited by s. 60 (*d*) of the Industrial and Provident Societies Act, 1893, in language almost identical with that used in s. 123, sub-s. 1, cl. (iv.), of the Companies (Consolidation) Act, 1908. Therefore the following proposition of law is applicable in every respect to a society registered under the Act of 1893—namely, that "in the matter of liability in respect of a member's shares in an industrial and provident society, the Act of 1893 provides in plain terms by s. 60 that no contribution shall be required from him exceeding the amount, if any, unpaid on the shares in respect of which he was a member, and any attempt to define the constitution of such a society in such a manner as that the member shall, in an event, be liable for a larger sum is in breach of the statute and is ultra vires. Any rules which can be used to maintain a scheme which imposes upon the member the alternative of accepting liability for a larger sum or of being dispossessed of his status as a member upon terms which he is not bound to accept are ultra vires." That statement is, mutatis mutandis, taken from the judgment of Buckley J. in *Bisgood's Case* (2), and it is not confined to cases under s. 161 of the Companies Act, 1862, now s. 192 of the Act of 1908: *Ooregum Gold Mining Co. of India* v. *Roper* (3); *Welton* v. *Saffery* (4); *Manners* v. *St. David's Gold and Copper*

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(1) [1891] 3 Ch. 28.

(2) [1908] 1 Ch. 743, 759.

(3) [1892] A. C. 125.

(4) [1897] A. C. 299.

Mines (1); and *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate.* (2) If that proposition is sound, then the rule which provides that a member shall be liable to take additional shares or be liable for a larger sum than he originally agreed to be liable for, is in breach of the statute and ultra vires, and therefore ineffectual to make a contract binding a member. A society under the Act of 1893 may have power to reduce its shares; but to use that power as part of a scheme for compelling a member to pay more than he agreed, on pain of being dispossessed of his interest in the society, is ultra vires. There is no provision in the case of a society under the Act of 1893, as there is in the case of a limited company, that the capital must be stated, but the effect of s. 34 (*a*) and Sch. II. of the Act of 1893 is to require a member to hold shares and of an amount specified in the rules, and the amount of his liability is limited to the nominal amount of his shares in respect of which he became a member of the society. A member cannot lawfully bind himself beforehand to incur under rules to be made after he has become a member a further liability which is prohibited by statute. There is a distinction between the liability of a member of a building society and that of a member of an industrial and provident society: the liability in the case of a building society is limited in a different way, and in the case of a non-advanced member is limited to the arrears of subscriptions, and he is under no obligation (as he is in the case of an industrial society) to make up any fixed amount towards the funds of the society: *In re United Service Share Purchase Society.* (3)

Cur. adv. vult.

1923. Jan. 17. P. O. LAWRENCE J. This case raises a question of general importance under the Industrial and Provident Societies Act, 1893. I need not recapitulate the facts, which are succinctly stated in the amended statement of claim and are all admitted.

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(1) [1904] 2 Ch. 593.
(2) [1899] 2 Ch. 80.
(3) [1909] 2 Ch. 526.

It is not disputed that the object of the amendments to the rules, the validity of which is challenged in this action, was to compel the members of the society to contribute further capital required for the purposes of the society's business. The society contends that such amendments are justified under the Act. The plaintiff on the other hand contends that the amendments are ultra vires, as constituting or being made in furtherance of a scheme for imposing upon a member a liability for a larger sum than the amount unpaid upon his shares. Incidentally, the question arises whether rule 12, as originally framed, is not also ultra vires, in so far as it purports to impose a liability on a member, in certain events, to acquire further shares. The solution of the questions thus raised is, in my opinion, not free from difficulty. Before dealing with these questions, however, I propose to state what I conceive to be the true meaning and effect of the rules as originally framed and as subsequently amended apart from the question of their validity. [His Lordship then referred to the original rules and said :] It is not disputed that the effect of these rules was that, if a member, although originally properly qualified, should at any time cease to hold the necessary qualification by reason of his farming a larger number of acres or by reason of his retailing a larger daily amount of milk, such member's shares would be cancelled and his membership would cease, unless he acquired more shares, so as to bring his qualification up to the required standard. [His Lordship then referred to the amendments of November, 1921, and continued :] The effect of these amendments was to compel all existing members who held less than the number of shares required by the amended rules to acquire further shares in the society without giving them the option of having their money repaid and their shares cancelled, unless the Committee thought fit to adopt that course.

Under the amendments of December, 1921, the nominal value of the shares was reduced from 1*l.* to 6*s.* 8*d.* This, I am told, was done in order to prevent the amendments of November, 1921, from operating as a possible breach of the provisions of s. 4 (*a*) of the Act in the case of members farming over 400 acres or having over 40 dairy cows.

Under the amendments of March, 1922, a member was required to hold shares of the nominal value of 5*l.* instead of five shares of 6*s.* 8*d.* each for every twenty acres or fraction of twenty acres farmed by him up to 500 acres and every milk producer was required to hold shares of the nominal value of 5*l.* instead of five shares of 6*s.* 8*d.* each for every dairy cow owned by him. The effect of this amendment was again to increase the qualification of members and to compel those members who did not hold the required number of shares to acquire further shares.

It appears that, until the case was opened before me, the society had contended that the effect of both the original and the amended rules was to compel a member to apply to the society for the allotment to him of the necessary shares to maintain his qualification, so that the society would itself receive the purchase money paid by the member for such shares; and I was informed that some thirty county court actions had been commenced on that footing by the society against members who were unwilling or unable to comply with the requirements of the rules and that such actions were standing over pending the decision in this case. Mr. Luxmoore however has admitted that this view of the effect of the rules is erroneous, and that the actions which have been brought cannot successfully be maintained. He however frankly admitted that the object of the new rules was to obtain further funds for the society, not only from new members, but also from the existing members, and contended that this result could be achieved, either by a further amendment of the rules compelling members to apply to the society for the further shares required for their qualification, or, even without further amendment, by allowing a reasonable time to elapse to enable members to acquire the further shares elsewhere, and then on their failure within that time to acquire the further shares by allotting the necessary shares to such members and compelling them by action or otherwise to pay for the shares so allotted to them on the principle laid down in *Ex parte Lord Inchiquin.* (1) The latter contention gains significance when it is remembered that no shares can be transferred without the assent of the committee and that, therefore, the member is at the mercy of the Committee as to whether he could acquire any shares by transfer; but I do not propose to determine whether such last-mentioned contention is sound or not, as the point is not strictly before me.

For the purposes of my decision in the present case it is sufficient to state that the rules, as they now stand, purport to render a member liable in certain events to acquire further shares in the society and, on failure to do so, purport to give the society the option either of forfeiting his shares or of holding him to his membership and compelling him to acquire the further shares. No authority has been cited which, in my opinion, supports the contention that the Act justifies rules being made which impose upon a member, in certain events, the alternative of acquiring further shares or of being or becoming liable to be dispossessed of his status of a member, or which provide that a member can be held to his membership and yet be compelled at the dictation of the majority of his fellow-members to acquire further shares, either from the society, or by transfer, and thus be forced to pay money beyond the amount unpaid upon his shares. The effect of these contentions, should they be held to be sound, is emphasized by the further contention advanced on behalf of the society, that the amount of the additional shares which under the rules, as now framed, a member may be compelled to acquire is practically without limit. In support of this contention counsel has argued that the limit of 200*l.* imposed by s. 4 (*a*) of the Act has reference merely to the nominal amount of the shares for the time being held by a member, and all the society has to do, when it desires to force members who already hold shares of the nominal value of 200*l.* to acquire further shares, is to reduce the nominal amount of the shares.

After having considered the arguments of counsel, I have come to the conclusion that the contentions thus advanced on behalf of the society are unsound for the following reasons. Industrial and provident societies are purely creatures of statute. They are trading societies conducting their business on co-operative lines and appear to have sprung into being under the provisions of the Friendly Societies Act of 1834, although, soon afterwards, they became the subject matter of special legislation. No doubt the present law relating to these societies is largely founded on the law applicable to friendly societies, but in some respects, and certainly so far as regards the limitation of the liability of members, it is quite evident that the law affecting these societies has been assimilated to the law affecting companies. The Industrial and Provident Societies Act, 1893, under which the society in the present case was registered, was a consolidating and amending Act, which does not seem to me to have changed materially the character of these societies under the legislation which had existed for some time previously thereto. Under that Act the word " limited " has to form the last word in the name of the society (s. 5, sub-s. 5); the registration of the society renders it a body corporate with limited liability (s. 21), and in the winding up no contribution can be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a past or present member (s. 60 (*d*)). These provisions find their complete counterpart in the Companies Acts. No such provisions are to be found in the Friendly Societies Acts or in the Building Societies Acts, and, in this respect, there is a fundamental distinction between friendly societies and building societies on the one hand and industrial and provident societies on the other. Further, as Neville J. pointed out in the case of *In re United Service Share Purchase Society* (1), the liability in the case of a building society is limited in quite a different way to that in the case of an industrial and provident society. In the former case the liability of a non-advanced member is limited to the arrears of the subscriptions which may be due at any particular time,

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(1) [1891] 3 Ch. 28.

(1) [1909] 2 Ch. 526, 537, 538.

and he is under no obligation to make up any fixed amount towards the funds of the society, whereas in the latter case, on the contrary, the liability of the members is fixed by the nominal amount of the shares and each member is liable to pay the equivalent of the nominal value of the shares which he holds.

If I am right in drawing this distinction between industrial and provident societies on the one hand and friendly societies and building societies on the other hand, it follows in my opinion that the principles laid down with regard to the effect of the limitation of the liability of members of limited companies apply to industrial and provident societies, and that the provisions which are to be found in the enactments and rules relating to friendly societies and building societies with regard to the liability of members for subscriptions and contributions have no application to societies registered under the Industrial and Provident Societies Act, 1893.

Now as regards limited companies, it is well settled that any attempt so to define the constitution of a company as that the members shall, in an event, be liable for a larger sum than the amount unpaid on their shares is in breach of the Companies Acts and is ultra vires; further, any clauses in the articles of association of a limited company which can be used to maintain a scheme which imposes upon the members the alternative of accepting liability for a larger sum or of being dispossessed of his status as shareholder upon terms which he is not bound to accept are ultra vires: per Lord Justice Buckley in *Bisgood* v. *Henderson's Transvaal Estates*. (1) As, in my judgment, the principles thus enunciated are applicable in every respect to industrial and provident societies registered under the Act of 1893, it follows that every rule (whether original or amended) of such a society which contravenes these fundamental principles is ultra vires. This conclusion does not appear to me to be inconsistent with the fact that the constitution of industrial and provident societies differs in many essential particulars from that of limited companies or with the fact that the Act of 1893

(1) [1908] 1 Ch. 743, 759.

contains many provisions which are inapplicable to limited companies or with the fact that, as regards societies registered under that Act, the contract of membership carries, in gremio, the right on the part of the society to make, and from time to time to alter, rules providing for the matters mentioned in Sch. II. to the Act. The right to make and alter rules must, in my opinion, always be subject to the fundamental principles governing the constitution of the society and, in my judgment, no rule is valid which purports to change the nature of that constitution.

Reliance has been placed by the defendant society upon s. 22 of the Act of 1893, which provides that the rules shall bind the society and all members thereof, as if each member had covenanted to conform thereto, subject to the provisions of the Act. A similar provision is to be found in the Companies Acts with regard to the articles of association of a limited company. With reference to this provision Lindley M.R. in *Baring-Gould* v. *Sharpington Syndicate* (1) stated that he did not understand and never had understood exactly what its true effect was, but thought it clear that it did not amount to an agreement between the company on the one side and the members on the other, so as to enable the company to sue a member upon it.

Apart altogether, however, from the practical difficulty of the society being unable to enforce a rule which provides that a member shall, in certain events, acquire further shares the true answer to the contention in favour of the validity of such a rule is, in my opinion, to be found in Lord Macnaghten's speech in the *Ooregum Gold Mining Co.'s Case* (2), where that learned law Lord, after approving of Mr. Buckley's statement that the dominant and cardinal principle of the Companies Acts is that the investor shall purchase immunity from liability beyond a certain limit on the terms that there shall be and remain a liability up to that limit, states that this condition cannot be dispensed with by anything in the articles, or by any resolution of the company or by any contract between the company and

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(1) [1899] 2 Ch. 80, 89.
(2) [1892] A. C. 125, 145.

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outsiders who have been invited to become members of the company and who do come in on the faith of such a contract. Dealing with the same subject Lord Herschell in *Welton* v. *Saffery* (1) points out that, although the articles become in effect a contract under seal by each member, they cannot diminish or affect any liability created by the express terms of the statute.

It is true that in the present case it is not sought to make a member liable to pay more than the nominal amount of any shares which he may for the time being hold, but what is sought to be done is to make him acquire further shares: the effect, however, is the same in both cases and the difference is only one of form. In both cases a member is sought to be made liable to pay more than the amount which is unpaid on his shares and, in my judgment, it makes no difference in principle that in the one case he is made to pay without acquiring any further shares, whereas in the other he is made to pay and thereupon does acquire further shares. In *Manners* v. *St. David's Gold and Copper Mines* (2) Romer L.J. held that a scheme whereby the shareholders of a company who had paid up their shares in full and were not under any liability to furnish any further capital were told that they must pay up more capital and, if they did not, should forfeit all interest in the company as a going concern, was ultra vires. In my opinion this decision in principle covers both the case of an attempt to make a shareholder who has paid up his shares in full pay up more capital without acquiring any further shares and the case of an attempt to make such a shareholder take up and pay for additional shares. The fact that in certain possible, though highly improbable, events the shareholders might be able to acquire the necessary shares from a member instead of from the company does not, in my opinion, make any difference in principle, because a liability, in a certain event, to pay a sum of money to a third party on pain of being dispossessed of the status of shareholder is, in my opinion, just as obnoxious to the cardinal principle referred to in the *Ooregum Gold Mining Co.'s*

(1) [1897] A. C. 299, 315.

(2) [1904] 2 Ch. 593, 606.

Case (1) as a liability to pay a further sum of money to the company. Moreover in the present case it must not be forgotten that the avowed object of the amendments was to obtain further capital for the society.

I do not, however, on the present occasion, intend to decide the general question, whether an industrial and provident society can ever reduce its capital by writing down the nominal value of its shares. In certain circumstances I can conceive that such a reduction might be proper and unobjectionable. But when such a reduction is effected in furtherance of a scheme for imposing upon the members a liability for a larger sum than the amount unpaid upon their shares or is done for the purpose of evading the provisions of s. 4 (*a*) of the Act, I am clearly of opinion that such a reduction of capital is ultra vires and void.

In the result I hold that rule 12, both in its original form and as amended, is ultra vires and void, in so far as it purports to impose a liability on a member in certain events to acquire further shares in the society's capital. Accordingly, I propose to make a declaration to that effect and to grant an injunction to restrain the defendant society from attempting to put into force against the plaintiff the amended rule 12. I will also make a declaration that the rules of the defendant society do not constitute or involve any contract as between the plaintiff and the defendant society to take up from the defendant society or pay to the defendant society for any shares in addition to the shares now held by him.

Solicitors: *Burn & Berridge, for Board & Stiling, Burnham, Somerset; Stephenson, Harwood & Tatham.*

H. C. H.

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(1) [1892] A. C. 125.

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Dec. 19, 20, 21.

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Jan. 12, 15; Feb. 7.

In re BROOKE.

BROOKE *v.* DICKSON (1).

[1922. B. 1908.]

Will—Limitations in strict Settlement—Legal Uses—Death of first Life Tenant—First Tenant in Tail not yet in esse—No Acceleration of second Life Estate—Intestacy—Contingent Remainders Act, 1877 (40 *&* 41 *Vict. c.* 33).

Settlement of real estate by will with the following limitations, which the Court held on the construction of the whole to be legal: E. for life; E.'s sons successively in tail male; the sons of R. successively in tail male; trustees during the life of C. The life estate of E., a bachelor, had determined by death. R. was living, but had no son:—

Held, that the estate pur autre vie of the trustees was not accelerated so as to take effect from the death of E., subject to its being afterwards determined by the birth of a son to R., and that there was an intestacy as to the mesne profits.

In re Scott [1911] 2 Ch. 374 considered.

ADJOURNED SUMMONS.

The testator died in 1888 leaving surviving him four children, Reginald, Edward, Constance, and Florence. By his will he provided for his elder son, Reginald, by giving him an annuity of 400*l.* "issuing out of my estate," and he disposed of his freeholds, copyholds, and leaseholds by giving, devising, and appointing them to trustees, their heirs, and assigns, to hold the same unto those trustees, their heirs, and assigns for ever, but nevertheless to the uses, upon the trusts, and for the ends, intents and purposes, and with, under, and subject to the powers, provisos, declarations, and dispositions thereinafter declared and contained of and concerning the same, that is to say, to the use of the trustees, their executors, administrators, and assigns for a term of ninety-nine years and, from and immediately after the expiration or other sooner determination of the term and in the meantime subject thereto and the trusts thereof, to the use of his younger son, Edward, for life, and from and after Edward's decease to the use of Edward's first and other sons successively in tail male, and in default or failure of such issue to the use of Reginald's first and other sons successively in tail male, and in default or failure of such issue to the use of the trustees, their executors, administrators, and assigns during the life of Constance upon trusts for her benefit during her life. The testator directed that his residuary personal estate should be laid out in the purchase of lands to be settled on the uses and trusts declared concerning his real estate.

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(1) Reversed, C. A. April 30, 1923. See [1923] W. N. 148.

The management clause in the will was as follows: "Provided also and I hereby declare that so long as the rules of law and equity will permit my said real estate shall be managed and the rents and profits thereof and also the dividends interest and income arising from my residuary personal estate shall be received and all arrangements and accounts with tenants and occupiers and other persons shall be made and settled by my trustees or trustee for the time being who shall pay out of such rents and profits dividends interest and income in the first place all expenses attending the collecting of rents repairs outgoings insurance against loss by fire and particularly the expense of keeping my fire engine and gear at my mansion at Ufford in perfect order and paying four men (one head man and three under him properly drilled if and when required) for such purpose and for attending as firemen if and whenever required (And I direct that my standing orders with respect to the use and employment of my engine shall be strictly adhered to) and all other expenses whatsoever attending and incidental to the management of my said estates and property also paying all annuities and other charges which for the time being may be charged thereon Also the expense of keeping in good repair and order (which I direct my trustees or trustee to do) all brasses monuments and tombs relating to my family and the Cobham family and their alliances in the churches and churchyards of the following parishes namely Athelington in Suffolk Crishall in Essex Cobham in Kent Cowling in Kent Hever in Kent Hoo in Kent Lingfield in Surrey Shorne in Kent Thorcombe in Dorset Ufford in Suffolk Yoxford in Suffolk and Westminster Abbey And shall pay the balance of such rents and profits to the person for the time being entitled thereto under this my will if he or she shall be of full age."

Edward died in 1921, a bachelor. Reginald was living, but had no son. In these circumstances on the true construction of the will was the limitation to the trustees during the life of Constance accelerated, so as to enable her to receive the rents and profits, or was there an intestacy as to such profits for a period beginning with the death of Edward and ending with the birth of a son to Reginald, or with the death of Reginald, if no son were born to him ?

This summons was taken out by the plaintiff, Constance Brooke, to determine whether upon the true construction of the said will and in the events which have happened (*a*) the clear residue of the rents and profits of all the hereditaments and real estate now subject to the trusts of the said will (after payment and discharge of the expenses of management and other expenses as therein mentioned) are now payable to the plaintiff during her life or during some other and what period; or (*b*) whether there is an intestacy as to such rents and profits during the life of the defendant Reginald Brooke so long as he has no son or during some other and what period.

J. I. Stirling for the trustees.

Preston K.C. and *Buckmaster* for the plaintiff. If the series of limitations stood alone there would be no doubt that they were legal, but other portions of the will show clearly a contrary intention that the fee should be in the trustees. Where there are purposes to be effected, trusts to be executed and duties to be performed requiring the trustees to have the fee the Court will reject the formal limitations as the mere blundering of the draftsman: *Cunliffe* v. *Brancker* (1); *Van Grutten* v. *Foxwell.* (2) The duties imposed on the trustees in the management clause are such that they would be unable to carry them out unless they had the legal estate. Also the testator directed that all the annuities were to be paid out of his residuary real and personal estate and from the annuity payable to Reginald the trustees were to deduct a debt due from him to the estate. The trustees could not do this unless they received the income and therefore they take the legal estate whatever words be used: *Barker* v. *Greenwood* (1); *White* v. *Parker* (2); *In re Adams and Perry's Contract.* (3) The rule is that the trustees under a devise to them and their heirs prima facie take a fee: *Collier* v. *Walters.* (4) In this will freeholds and copyholds are combined in one devise. The legal estate in the copyholds is in the trustees, and the common devise indicates that the freehold estate is also in them: *Houston* v. *Hughes.* (5) It is submitted that the limitations here are equitable, and that therefore there is no difficulty in accelerating the plaintiff's interest: *In re Conyngham* (6); *In re Willis.* (7)

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(1) (1876) 3 Ch. D. 393, 407.

(2) [1897] A. C. 658, 683.

It was the plain intention of the testator to make these limitations exhaustive against his heir, and that on the determination of the prior estate the person next entitled should take the income. If possible the Court will always give effect to the testator's intention: *D'Eyncourt* v. *Gregory* (8); *Lainson* v. *Lainson* (9); *Turton* v. *Lambarde.* (10) Even if the limitations were legal *In re Scott* (11) ought not to be followed, because that decision was based on the mistaken view that the Contingent Remainders Act, 1877, created an estate to preserve contingent remainders. But the Act restores the destroyed contingent remainder as an executory limitation. It is submitted that here the limitation to the trustees pur autre vie takes effect as an executory limitation on the death of Edward, subject to its opening to let in the estate of any son that may be born to Reginald: see Challis on Real Property, 3rd ed., p. 124.

Romer, for testator's daughter Florence, adopted the argument for the plaintiff.

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(1) (1838) 4 M. & W. 421, 429.
(2) (1835) 1 Bing. N. C. 573.
(3) [1899] 1 Ch. 554, 561.
(4) (1873) L. R. 17 Eq. 252.
(5) (1827) 6 B. & C. 403.
(6) [1920] 2 Ch. 495; [1921] 1 Ch. 491.
(7) [1917] 1 Ch. 365.
(8) (1864) 34 Beav. 36, 48.
(9) (1853) 18 Beav. 1; 5 D. M. & G. 754.
(10) (1860) 1 D. F. & J. 495, 516.
(11) [1911] 2 Ch. 374.

G. B. Hurst K.C. and *R. H. Hodge* for the heir at law. The limitations are legal, the case is governed by *In re Scott* (1), and there is an intestacy. If the legal estate were in the trustees the use to them for ninety-nine years and during the lives of Constance and Florence and the provision that they should have free access to the mansion house would be unnecessary. If the fee were in the trustees they would take nothing under those limitations, which would be absurd: *Cunliffe* v. *Brancker.* (2) In the case of the daughters, whose interests were equitable, there is a provision entitling them to occupy the mansion house, but there is no such provision in the case of the other tenants for life, and that because they had the legal estate. That the limitations are legal is also shown by the form of the power of sale given to the trustees, which is to be carried out by revocation and appointment of uses.

These limitations are limitations of legal estates, and the management clause in the will does not show clearly a contrary intention that the fee should be in the trustees. The duties of the trustees under that clause could be discharged if the legal estate were in the beneficiaries, and the clause is in the administrative part of the will and after the operative part where are the actual devise and uses. The Court will not imply that the trustees have the legal estate in the freeholds, because the freeholds and the copyholds were combined in one devise to them. The question of the estate taken by the trustees in either kind of property must be determined apart from the circumstance that they are comprised in the same devise: *Baker* v. *White* (3); *In re Townsend's Contract.* (4)

Even if the limitations are equitable there is an intestacy because here the limitation to the trustees during the life of Constance is "in default or on failure of issue" and is therefore contingent, and the trustees take nothing until the prescribed event occurs. In the case of *In re Willis* (5) the words were "in default of such issue," but it was not argued that the limitation was contingent and it was held that on the construction of that will there was an exhaustive disposition of the whole estate.

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(1) [1911] 2 Ch. 374.
(2) 3 Ch. D. 393, 400.
(3) (1875) L. R. 20 Eq. 166.
(4) [1895] 1 Ch. 716.
(5) [1917] 1 Ch. 365.

Cur. adv. vult.

1923. Feb. 7. Russell J. The testator died on January 13, 1888. Edward Brooke died on April 25, 1921, a bachelor. Reginald Brooke is still alive, aged sixty-seven; he is married but has no children. The limitations in favour of Edward Brooke's sons accordingly failed; and there was not on the death of Edward Brooke and is not at present any person in existence capable of taking under the limitations in favour of the sons of Reginald Brooke, which precede the limitation to the trustees during the life of Constance Brooke, who is alive.

The question thus arises whether this latter limitation is accelerated so as to entitle the plaintiff (Constance Brooke) to receive the clear residue of the rents and profits, or whether there is an intestacy as to such rents and profits in respect of a period commencing with the death of Edward Brooke and ending either with the birth of a son of Reginald Brooke, if one be born to him, or with the death of Reginald Brooke, if no son be born to him.

It was said on behalf of the plaintiff that under the will the legal estate is in the trustees, that the limitations are equitable, that the testator has shown a clear intention to make those equitable limitations completely exhaustive against his heir, and that the case is governed by the decision of *In re Conyngham* (1) and not by the decision of *In re Scott*. (2) It was further said that, even if the limitations are legal, *In re Scott* (2) should not be followed because the decision is based on an erroneous view of the effect of the Contingent Remainders Act, 1877, and that there is no intestacy but that the subsequent interest is accelerated.

On behalf of Reginald Brooke, the heir of the testator, it was argued that the limitations are legal limitations and that *In re Scott* (2) governs the case. It was further contended that even if the limitations were equitable there was nevertheless upon the true construction of this will an intestacy, because the limitation to the trustees during the life of Constance was a contingent limitation, being introduced by the words " in default or on failure of such issue," and not, as in *In re Conyngham* (1), by the words " with remainder."

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(1) [1920] 2 Ch. 495; [1921] 1 Ch. 491.

(2) [1911] 2 Ch. 374

I have, I think, fairly summarized the rival contentions, and it is obvious that the first thing to do is to ascertain whether the limitations in this will are legal or equitable.

There are indications in the will pointing in each direction, a state of affairs which I suspect results from a failure to combine various precedents into one harmonious whole.

The points principally relied upon by counsel for the plaintiff were as follows: 1. The annuity to Reginald Brooke is described as " issuing out of my estate." The trustees are to " deduct " certain moneys from the annuity until a debt due from Reginald to the testator is liquidated; and the testator directs that all annuities given by his will shall be paid out of the income of his real and residuary personal estate. How, it is asked, can the trustees " deduct," unless theirs are the hands which are to receive the income of the real estate and residuary personal estate (which is directed to be laid out in the purchase of land to be settled upon the uses and trusts declared concerning the real estate) and thereout pay the annuities? 2. The will contains after the limitations a management clause which runs as follows. [His Lordship read the clause.] It is said that this clause is decisive, because it is impossible for the trustees to perform the duties imposed upon them by a clause, imperative in form, unless they have vested in them the legal fee. *Barker* v. *Greenwood* (2) was cited, where lands were devised to trustees and their heirs to hold to them and the survivors or survivor of them and the heirs of such survivor upon trust to permit and suffer the testator's wife to receive and take the net rents and profits during her life. It was contended that the legal estate was executed in the wife during her life. Baron Parke and Baron Alderson held that the legal estate

(1) [1920] 2 Ch. 495; [1921] 1 Ch. 491.

(2) 4 M. & W. 421, 429.

was in the trustees, because the trust being only to permit the wife to receive the net rents, the trustees had to receive the gross rents, and for this purpose the legal estate must remain in them during her life. The following passage in Baron Parke's judgment was much relied upon: "It is also equally clear and settled, that if the testator distinctly expresses his meaning to be, that the trustees are to interfere in the execution of the trusts, and certain duties are cast upon them—if he order, for example, that they shall receive the rents, etc.—there they take the legal estate, whatever words may be used." It is to be observed, however, that the duty to receive the gross rents was in that case held to be imposed by the terms of the devise. The trustees could only be entitled to receive them by virtue of the devise; in other words the right to receive them was not conferred upon them (as here) by an express power for the purpose. The same remarks apply to *White* v. *Parker* (1), in which case, however, there was, in addition to the devise upon trust to suffer the receipt of the clear rents, an express direction to the trustees to discharge outgoings. In the present case the express direction contained in the management clause rather suggests that the trustees would have had, apart from the clause, no right to receive the rents, but are put in possession of a power enabling them so to do. The clause is not, as was the clause in *Berry* v. *Berry* (2), framed upon the assumption that the trustees would, by force of the estate vested in them under the devise, be entitled apart from the clause to receive the rents. 3. The plaintiff also relied upon the phrase "trusts of this my will" which occurs in different places, sometimes associated with other words, including "uses," sometimes standing alone; and also upon references to persons, "beneficially entitled"; but these appear to me points of little weight. 4. A further point made by the plaintiff was this: Part of the land devised is copyhold, the legal estate of which it is conceded must be in the trustees. Accordingly, it is said that this is an indication that the legal estate in the freeholds (which are combined with the copyholds in one devise) is in the trustees also. Bayley J. in *Houston* v. *Hughes* (1) treated the combination of freeholds and copyholds as a circumstance assisting the Court in determining whether trustees take the whole fee or less than the fee. But Sir George Jessel in *Baker* v. *White* (2) would have none of this theory of attraction; and Stirling J., in *In re Townsend's Contract* (3), cites him as deciding that the question of the estate taken in either kind of property by trustees must be determined irrespectively of the circumstance that both are comprised in the same devise.

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(1) 1 Bing. N. C. 573.

(2) (1878) 7 Ch. D. 657.

I have now mentioned, if not all the points urged on behalf of the plaintiff, at all events those which appeared to possess any weight; and it is obvious that her counsel was well justified in describing the management clause as his "sheet anchor."

On behalf of the heir at law it was claimed that apart from any other context to be found in the will, the limitations were legal limitations and nothing else. Indeed, this was not disputed. But further it was argued that many contexts were to be found emphasizing this to the full. 1. It was said that if the legal estate was in the trustees, the use to the trustees for ninety-nine years and the uses during the respective lives of Constance and Florence would be unnecessary and absurd. If the trustees had already got the fee they would take nothing under these limitations, as was pointed out by Sir George Jessel in *Cunliffe* v. *Brancker*. (4) 2. It was pointed out that in the case of the daughters whose interests were only equitable, special provisions are inserted entitling them to reside in and occupy the mansion house; and that no such provisions are inserted as to other tenants for life because in their case such provisions were unnecessary, the legal estate being in them. 3. A power to the trustees to have free access to the mansion house was, it is said, unnecessary if the trustees took the legal estate. 4. The power of leasing given to tenants for life in possession by the will is vested in the trustees during the life of either of the testator's daughters who is actually entitled to the receipt of the rents. This, it is said, points to the other tenants for life having the legal estate, while the estate of the daughters is only equitable. 5. Other indications, which it is said point to the limitations being legal limitations, are (1.) the form of the power of sale in the trustees, which is to be carried out by revocation and appointment of uses, and (2.) a clause which is found at the end of the limitations. After the limitation to the trustees during the life of Constance, the will contains a similar limitation after her decease to the trustees during the life of the testator's daughter Florence for her benefit which is followed by a limitation for life to the person who at the testator's decease shall be ascertained to be the heir male of the body of one Sir Thomas Brook who died in 1418. Then come a series of limitations to that person's sons successively in tail male, followed by limitations in tail male to certain sons of Sir John Ralph Blois, followed by limitations in tail male to the daughters of Edward, the sons of Constance, the sons of Florence, the daughters of Constance, the daughters of Florence, followed by limitations in tail to the sons of Edward, the sons of Reginald, the daughters of Edward, the daughters of Reginald, the sons of Constance, the sons of Florence, the daughters of Constance and the daughters of Florence. The final limitation is "to the use of my right heirs their heirs and assigns for ever." Then comes the clause in question in the following terms: "And for the purpose of protecting the contingent uses and estates hereinbefore created I devise and appoint the hereditaments hereinbefore limited to any person during his natural life immediately after the determination of that estate by forfeiture or otherwise unto and to the use of my said trustees Charles John Robinson Howard Whitbread and Ernest George Doughty their executors administrators and assigns during the natural life of the person whose estate shall so determine in trust for him and by the usual means to protect the contingent estates expectant or depending thereupon." It is said that such a provision is unnecessary if the limitations are equitable. Whichever view one takes upon the question whether the limitations are legal or equitable, some passage or expression can be pointed to in the will which may be said to be inconsistent with that view. Starting, however, from what is common ground, namely, that taken by themselves the limitations are legal limitations, I ask myself this question: Do I, after a careful consideration of the whole will find in it any context showing so clearly a contrary intention that the legal estate is to be in the trustees, that I should reject the formal limitations? I am unable to do so. The result is that I hold that the limitations are legal limitations.

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(1) 6 B. & C. 403.

(2) L. R. 20 Eq. 166.

(3) [1895] 1 Ch. 716.

(4) 3 Ch. D. 393, 400.

Upon this hypothesis the matter stands thus. There was a legal limitation to Edward for life followed by legal limitations to his sons successively in tail male, followed by legal limitations to the sons of Reginald successively in tail male, followed by a legal limitation to the trustees during the life of Constance. Edward's life estate has determined by his death. He died a bachelor. There is no son of Reginald in existence, but Reginald is still alive. Is the estate pur autre vie of the trustees accelerated, so as to take effect from the death of Edward, subject to its being hereafter determined by the birth of a son of Reginald?

If *In re Scott* (1) is a correct decision the answer is, No. In that case, which was a case of legal limitations, Warrington J., after a consideration of the authorities, held it impossible that there could be an estate in remainder which might afterwards come to an end so as to let in an estate previously limited, and that the estate in question in that case was not accelerated.

That decision and the reasoning upon which it was founded were much discussed and criticised in argument before me; and I confess that the decision seems to a large extent based upon a view of the operation and effect of the Contingent Remainders Act, 1877, which does not commend itself to me. The learned judge treats the Act as though its operation and effect were to put the limitation to the unborn son of the tenant for life (who had disclaimed his life estate) on the same footing as if there had been a limitation to the use of

(1) [1911] 2 Ch. 374.

trustees to preserve contingent remainders. If that were so, then if the limitation to the son of the tenant for life ever took effect, it would take effect upon the footing that it was a contingent remainder which had vested before the determination of the particular estate. That view appears to me contrary to the wording of the Contingent Remainders Act, 1877, which restores the destroyed contingent remainder as an executory limitation, and in terms provides that it shall "be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation." If this be the true operation and effect of the Act, and in my opinion it is, then there is much to be said for the view that the limitation in this will to the trustees pur autre vie, and the other limitations subsequent to the limitation in favour of Reginald's first son in tail male, take effect also as executory limitations; for though nothing hinders an executory limitation from being subsequent to a legal remainder, a legal remainder cannot be subsequent to an executory limitation: see Challis on Real Property, 3rd ed., p. 124. If then the limitation to the trustees pur autre vie takes effect as an executory limitation I can myself see no valid objection to its taking effect on the death of Edward, subject to its opening to let in the estate of any son who may thereafter be born to Reginald. However, I feel a difficulty in giving effect to this view. The decision in *In re Scott* (1) was considered by Younger J. in *In re Willis* (2), which was a case of equitable limitations; a case therefore to which it did not apply. None the less Younger J. stated in his judgment that had it been applicable to the case before him he would, notwithstanding the criticisms on it, have considered it his duty to follow it. *In re Scott* (1) was also considered by Astbury J. and the Court of Appeal in *In re Conyngham* (3), and is referred to in the judgments in both Courts. *In re Conyngham* (3) was also a case of equitable limitations, but

(1) [1911] 2 Ch. 374.
(2) [1917] 1 Ch. 365.
(3) [1920] 2 Ch. 495; [1921] 1 Ch. 491.

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in neither Court is any doubt expressed as to the correctness of the decision in the case of *In re Scott*. (1) The position accordingly is that, whatever criticisms may be made upon the grounds of the decision, the decision itself has not been dissented from by any Court. In these circumstances it seems to me that I ought to follow that decision in the present case, leaving any formal dissent to be expressed (if thought proper) by a Court capable of overruling it.

The result is that I decide that there is an intestacy as to the rents and profits during the period before mentioned.

In these circumstances it is unnecessary to decide the point whether in any event there could be no acceleration here because the limitation to the trustees during the life of Constance is, upon the true construction of this will, merely a contingent limitation under which nothing can be taken by the trustees until the prescribed event occurs. But I would point out that, although there is authority for saying that words of contingency such as "in default of such sons" may in a particular context be read as equivalent to "failing the limitations to the sons" (see *Doe* v. *Dacre* (2)), yet in this particular will the testator (in the clause immediately following the limitation to his right heirs) himself describes the uses and estates created by his will as being contingent.

Solicitors: *Corbould, Rigby & Co.; Lawrance, Webster, Messer & Nicholls.*

(1) [1911] 2 Ch. 374.

(2) (1798) 1 Bos. & P. 250.

J. B. B. M.

JACKSON *v.* SIMONS.

[1922. J. 968.]

ROMER J.

1922

Nov. 28, 29, 30; Dec. 1, 21.

Landlord and Tenant—Shop—Covenant not to assign, underlet, or part with or share the Possession or Occupation of the demised Premises or any Part thereof—Licence to use Part nightly between 10.30 P.M. *and* 2 A.M.—*Sharing Possession—Breach—Covenant against sharing Possession not within Exception in sub-s.* 6 (i) *of s.* 14 *of the Conveyancing Act,* 1881 (44 *& 45 Vict. c.* 41)—*No preliminary Notice to remedy Breach—Dismissal of Action.*

The defendant was lessee of a ground-floor shop under a lease granted by the plaintiff which contained a covenant by the defendant not to assign, or underlet, or part with the demised premises or any part thereof, or part with or share the possession or occupation thereof or of any part thereof. The lease also contained the usual power of re-entry.

The defendant, without the plaintiff's consent or knowledge, agreed, for the sum of 7*l.* per week, to allow the proprietor of a night club carried on in a basement beneath the shop to use the front part of the shop between the hours of 10.30 P.M. and 2 A.M. for the sale of tickets of admission to the club. The part so used was the front of the shop, entered through the front door, and was partitioned off from the counter and rest of the shop by a movable screen erected every evening at the close of shop hours and removed the following morning when the shop reopened. The screen when fixed was secured in its position by a padlock, the key of which was retained by the defendant. This arrangement continued from July, 1920, until March, 1922, when the plaintiff, without serving any preliminary notice under s. 14, sub-s. 1, of the Conveyancing Act, 1881, commenced this action to recover possession of the premises for breach of the above-mentioned covenant:—

Held (1.), that the arrangement conferred no estate or interest in the demised premises but was a mere privilege or licence to use a portion thereof, the defendant retaining the legal possession of the whole, and did not, therefore, constitute a breach of the covenants not to assign, underlet, or part with the demised premises or any part thereof.

Peebles v. *Crosthwaite* (1897) 13 Times L. R. 37, 198, applied.

(2.) That although the arrangement was admittedly a breach of the later covenant against sharing the possession or occupation of any part, that covenant was not included in or covered or described by the four several and distinct covenants specified in sub-s. 6 (i) of s. 14 of the Conveyancing Act, 1881, exempting a lessor from the necessity of serving a preliminary notice under sub-s. 1; and that, as the plaintiff had omitted to give such notice, the present action was not maintainable.

Observations upon the true construction and effect of sub-s. 6 (i) of s. 14.

WITNESS ACTION.

By an underlease dated December 4, 1906, the predecessors in title of the plaintiff demised to the defendant the ground floor shop of No. 143, now No. 141, Charing Cross Road, for a term of twenty-one years from September 29, 1906, at a yearly rent, after the first fourteen years of the term, of 300*l.* The underlease contained a covenant by the defendant not to assign, or underlet, or part with the demised premises or any part thereof, or part with or share the possession or occupation thereof or of any part thereof without the consent in writing of the landlords previously obtained, provided that such consent should not be withheld from a respectable and responsible tenant; and also the usual proviso for re-entry by the landlords in the event of a breach, non-performance or non-observance of the lessee's covenants. This was an action by the plaintiff to recover possession of the demised premises by reason of an alleged breach by the defendant of the above-mentioned covenant. The admitted facts leading up to the institution of the action were as follows.

Since the date of the underlease the defendant had been carrying on upon the demised premises the business of a retail tobacconist in partnership with one of his brothers, Mr. Maurice Simons, to whom the management of the business had been left exclusively. The basements of No. 141, Charing Cross Road, and of some of the adjoining houses, which also belonged to the plaintiff, were, and for some time past had been, in the occupation of a Mr. Barron, who had been carrying on there the business of a night club known as "Brett's." Access to these basements was obtained by means of an entrance from Charing Cross Road adjoining No. 141 on the north side thereof and by a staircase leading down from that entrance. In the month of July, 1920, the sale of tickets upon a landing on the staircase in question to persons desirous of entering the night club was discontinued in consequence of some objection on the part of the police authorities, and Mr. Barron's manager came to an agreement with Mr. Maurice Simons under which Mr. Barron was to have the right of selling such tickets in the front part of the tobacconist's shop, and whereby Mr. Barron was to pay for this privilege the sum of 7*l.* per week. The agreement was merely a verbal one and was never reduced to writing.

Soon after this arrangement had been made, Mr. Barron, in consequence of the desire of Mr. Maurice Simons to have the shop protected, caused to be constructed a partition or screen for the purpose of cutting off the front part of the shop, in which the tickets were to be sold, from the back part of the shop where the shop counter was situated. The screen was removable but, when once in position, could only be removed by unlocking a padlock. The cost of erecting the screen was defrayed by Mr. Barron, but the key of the padlock was retained by Mr. Maurice Simons, who, or whose assistants, erected the screen every evening, when the day's business at the shop had concluded, and removed the screen the following morning when the shop was reopened. In the space between this screen and the front window of the shop, tickets for Brett's Night Club were sold every evening from July, 1920, to the end of March, 1922, by Mr. Barron's cashier, assisted by a porter, between the hours of 10.30 P.M. and 2 A.M. For this purpose Mr. Barron caused a table and chairs to be brought up to the shop every evening from the night club premises, and such table and chairs were taken back to the club when the sale of tickets was finished. Access to the place was obtained by means of the front door of the shop, of which Mr. Barron had been provided with a key.

On March 22, 1922, the plaintiff, who until January of that year was unaware of the arrangement made with Mr. Barron and of the use to which the front part of the shop had been devoted under that arrangement, issued his writ in this action, but before doing so did not serve upon the defendant any such notice as is mentioned in s. 14, sub-s. 1, of the Conveyancing Act, 1881.

The defendant raised several defences, but those which were alone material for the purposes of this report were (1.) that the acts above mentioned did not amount to either an underletting or a parting with the possession of the demised premises or any part thereof, but he admitted, however, that they constituted a sharing of the possession of part of the demised premises; and (2.) that, in the absence of a

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preliminary notice under s. 14, sub-s. 1, of the Conveyancing Act, 1881 (1), this action was not maintainable, the covenant, so far as it related to the underletting or parting with or sharing the possession of part only of the demised premises, not being within the exception contained in sub-s. 6 (i) of that section.

Cunliffe K.C. and *Chetwynd Leech* for the plaintiff. The defendant committed a breach of the covenant against assigning, underletting, or parting with possession of the demised premises or any part thereof by letting a separated part: *Roe* v. *Sales* (2); *Greenslade* v. *Tapscott* (3); *Selby* v. *Greaves*. (4) Continuity is not essential for a letting, and occupation for a few hours each day may amount to an interest in land: *Smallwood* v. *Sheppards* (5); *Ayers* v. *Hanson* (6); *Joel* v. *International Circus and Christmas Fair*. (7) If this is not a letting, then it is a parting with possession, which, we submit, covers sharing the occupation, and in either case sub-s. 6 (i) of s. 14 of the Conveyancing Act, 1881, applies.

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(1) Sect. 14 provides:—"(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

"(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief, may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit."

"(6.) This section does not extend:
"(i) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; . . . ."

(2) (1813) 1 M. & S. 297.

(3) (1834) 1 C. M. & R. 55.

(4) (1868) L. R. 3 C. P. 594.

(5) [1895] 2 Q. B. 627.

(6) [1912] W. N. 193; 56 Sol. J. 735.

(7) [1920] W. N. 365, 383.

[ROMER J. That sub-section in terms relates only to the "land leased"; there is no reference to "any part thereof."]

We submit that the sub-section extends the exception to part only of the demised premises.

Daly v. *Edwardes* (1) and *Frank Warr & Co.* v. *London County Council* (2) are distinguishable on the ground that in those cases no exclusive occupation was given and there was no covenant against underletting a part of the premises.

Manning K.C. and *Russell Gilbert* for the defendant. There was no underletting or parting with the possession of the whole or any part within the meaning of the covenant, and even if there was, the case does not come within the exception in sub-s. 6 (i) of s. 14 of the Conveyancing Act, 1881, and as the notice required by that section has not been given, this action is not maintainable.

There has been no underletting or parting with possession because the defendant has all along been in legal control of the premises and of the part in question: *Peebles* v. *Crosthwaite* (3), which authority is, we submit, conclusive; Foà, Law of Landlord and Tenant, 5th ed., p. 278. The defendant had the key the whole time and could get into the premises whenever he liked; he never went legally out of possession. There was no doubt a sharing of the occupation of this part, but no exclusive possession was given. It was a mere licence conferring no exclusive possession, which is the essence of a lease: Woodfall's Landlord and Tenant, 20th ed., p. 153. In *Hancock* v. *Austin* (4) no relation of landlord and tenant was created between the owner of a room and another who was permitted to place and work his machines there on payment of 12*s*. a week, and again in *Taylor* v. *Caldwell* (5) no demise was created by an agreement to let a man have possession of a music-hall for four days at 100*l*.

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(1) (1900) 83 L. T. 548; (1901) 85 L. T. 650.

(2) [1904] 1 K. B. 713.

(3) 13 Times L. R. 37, 198.

(4) (1863) 14 C. B. (N. S.) 634.

(5) (1863) 3 B. & S. 826.

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per day, the owner not parting with the possession of the premises during that time. *Ayers* v. *Hanson* (1), which followed the decision in *Smallwood* v. *Sheppards* (2), where the question of licence or lease was not argued, does not seem consistent with *Taylor* v. *Caldwell* (3), which is the more valuable authority. In both *Edwardes* v. *Barrington* (4), and *Frank Warr & Co.* v. *London County Council* (5), there were words of demise or letting, and yet it was held that they conferred no interest in land. In *Greenslade* v. *Tapscott* (6) there was not such an occupation by the licensee as would have been sufficient to work a forfeiture, and in *Joel* v. *International Circus and Christmas Fair* (7) there was an actual letting; *Roe* v. *Sales* (8) was a case of exclusive possession, so that those three cases are not really authorities against our contention that in this case there was no underletting or parting with possession. The defendant is still in legal possession of the whole shop.

Further, this was a sharing of occupation of a part only of the demised premises and is not within the exception in sub-s. 6 (i) of s. 14 of the Conveyancing Act, 1881, which exception does not include a covenant against sharing possession or occupation, and relates only to a covenant in respect of assigning, or of underletting, or of parting with the possession of, or of disposing of the whole of the demised premises, and not to the wider covenant extending to any part of them. A covenant against underletting the whole or any part are two distinct covenants, and an underletting of part is not a breach of a covenant which relates only to the whole: *Grove* v. *Portal* (9), following the dictum of Lord Eldon in *Church* v. *Brown* (10), and referring to *Crusoe* v. *Bugby* (11); Wolstenholme's Conveyancing and Settled Land Acts, 10th ed., p. 64.

The words "or any part thereof" occur in various covenants for title in s. 7 of the Conveyancing Act, 1881, and also in ss. 10, 18, 19, sub-s. 1 (i); 43, sub-s. 1 (iii); and 62, sub-s. 1, and it is significant that they are omitted from s. 14, which is a remedial section and in a case of forfeiture should be construed strictly. We submit that a covenant against sharing possession is not within the exception at all, and that if it is the exception relates only to a case where the possession of the whole of the land leased, and not a part of it, is shared.

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(1) [1912] W. N. 193; 56 Sol. J. 735.
(2) [1895] 2 Q. B. 627.
(3) 3 B. & S. 826.
(4) 83 L. T. 548; 85 L. T. 650.
(5) [1904] 1 K B. 713.
(6) 1 C. M. & R. 55.
(7) [1920] W. N. 365, 383.
(8) 1 M. & S. 297.
(9) [1902] 1 Ch. 727.
(10) (1808) 15 Ves. 258.
(11) (1771) 2 W. Bl. 766.

If the plaintiff is not within the exception of sub-s. 6 (i) he cannot succeed, not having given the notice required by sub-s. 1. He must give the notice even if he only claims a declaration of forfeiture: *Wilson* v. *Rosenthal.* (1)

Cunliffe K.C. in reply. Underletting is a question of fact, and the test is whether or not exclusive possession has been given. For four hours every night exclusive possession has been given of the front part of this shop, which was cut off so as to prevent any one from getting to the other part.

Sect. 14 deprives a landlord of rights which he previously had, and the section must be construed fairly. The Legislature could never have intended by sub-s. 6 (i) to save the landlord's rights in the case of assigning, underletting, parting with the possession or disposing of the land leased, and yet not protect him in the case of sharing the possession, which might be equally injurious to and jeopardise his property. The exception in sub-s. 6 (i) only refers to the type or description of the covenant; it simply indicates the kind of covenant to which the section was not to apply. The covenant against underletting the whole has been construed strictly as not applying to an underletting of part, but in this case the Court is asked to construe the sub-section, not the covenant, and we submit that the rigid rule applied by the Courts in construing the covenant should not be imported into the words of the sub-section. The question is—is the covenant, not the breach, within the exception? Suppose the covenant were "not to let any part of the land demised" and that the tenant had let the whole of it, could it be said that an action of forfeiture, in the absence of notice, was not maintainable? We submit not.

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(1) (1906) 22 Times L. R. 233.

Cur. adv. vult.

Dec. 21. Romer J. [after stating the facts and dealing with the defences not material to this report, continued:] I now turn to a consideration of the question whether the arrangement made between Mr. Maurice Simons and Mr. Barron's manager, and the acts done in pursuance of that arrangement, constituted an underletting or a parting with the possession of a part of the demised premises. I have come to the conclusion that they did not. If the arrangement constituted an underletting it must have conferred upon Mr. Barron some estate or interest in land, and this, in my opinion, was not the effect of the arrangement. All that was conferred upon Mr. Barron was, as it seems to me, a mere privilege or licence to use a part of the demised premises: see *Daly* v. *Edwardes* (1), also *Frank Warr & Co.* v. *London County Council.* (2) The defendant moreover retained the legal possession of the whole of the premises at all material times and, as pointed out by Romer J. in *Peebles* v. *Crosthwaite* (3), a lessee who retains such possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises. The defendant did not therefore, in my judgment, commit any breach of the covenant against underletting or parting with the possession of the demised premises or any part thereof.

It is however admitted, as already pointed out, that the acts for which I have held the defendant to be responsible amounted to a sharing of the possession of part of the demised premises, and it becomes therefore necessary to consider the defence based upon s. 14 of the Conveyancing Act, 1881, for the defendant contends that a covenant not to share the possession of the demised premises is not within the exception contained in sub-s. 6 of the section. [His Lordship read s. 14, sub-ss. 1, 2 and 6 (i), and continued:] It is clear that the exception in sub-s. 6 (i) is not confined to a covenant or condition by which all the things referred to are forbidden. Obviously a covenant against assigning the demised premises is within the exception, although the covenant does not go on to mention underletting or parting with the possession. The sub-section therefore includes a covenant or condition against any or all of the following things—namely, the assigning, the underletting, the parting with the possession, or the disposing of the land leased. Does it also include a covenant or condition against sharing the possession of the land leased? The plaintiff contends that it does for the following reasons: (1.) That it cannot have been intended to except covenants against parting with the possession of the demised premises, and to let the section operate in cases where the breach of covenant consists in a sharing of the possession, and that unless I read the sub-section in the way he desires I shall be defeating the intention of the Legislature; (2.) that the sub-section is merely describing, by general words, a well-known class of covenant, of which a covenant against sharing the possession of the demised premises is as much a member, as is a covenant against assigning or underletting or parting with possession.

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(1) 83 L. T. 548; affirmed sub nom. *Edwardes* v. *Barrington*, 85 L. T. 650.

(2) [1904] 1 K. B. 713.

(3) 13 Times L. R. 37; affirmed ibid. 198.

But as to the first of these contentions, I know nothing of the reasons that induced the Legislature to make the exceptions which are admittedly covered by the sub-section. The plaintiff says, and perhaps truly, that the Legislature considered a breach of a covenant against assignment, or underletting, or parting with the possession of the demised premises such a serious matter that the landlord's right to re-enter for such a breach ought not to be restricted in any way. He further says that the sharing the possession of the demised premises is or may be equally serious to the landlord (though I do not think that this is so), and that the Legislature must therefore have intended to treat all these breaches on an equal footing. But why am I to assume that the Legislature intended this? Why, for instance, should a covenant against sharing the possession of the demised premises be excepted and a covenant for insurance against fire not be excepted? The seriousness to the landlord of a breach of the latter covenant, when once a fire has occurred, would seem to be as great, and might be very much greater than, a breach of the former. It seems to me just as probable that the Legislature intended covenants against sharing the possession of the demised premises to be excluded from sub-s. 6 (i) as that it intended such covenants to be included. Indeed it must be remembered that s. 14 only precludes a landlord from enforcing his right of re-entry or forfeiture for a breach of any covenant or condition to which the section applies in cases where the lessee after notice fails to remedy the breach, if it is capable of remedy, and to make reasonable compensation for the breach; and the Legislature may well have thought it right to impose this restriction upon landlords just as much in cases where the covenant or condition broken is one against sharing the possession of the demised premises as in cases where the covenant or condition broken is one for insurance against fire, or against using the demised premises for the purpose of carrying on some offensive trade. In the circumstances, I think that it is safer to assume that the intention of the Legislature is that which the words of the sub-section, when properly construed, would imply rather than to endeavour to ascertain that intention by any process of a priori reasoning.

As to the contention that the sub-section in question is describing a well-known class of covenant in language wide enough to include all members of that class, I should have expected, if that had been the intention of the Legislature, to find a much more general description, such as "covenants against alienation," rather than the detailed description used by the sub-section. It is well settled that a covenant not to assign the demised premises is not broken by underletting, that a covenant not to assign or underlet is not broken by a mere declaration of trust of the lessee's interest or by a parting with the possession of the demised premises. In *Church* v. *Brown* (1) Lord Eldon had to consider the question whether a covenant restraining the assignment, underletting, or parting with the demised premises or any part thereof (compendiously referred to, it is worth noticing, by the learned reporter in the marginal note as a covenant "restraining alienation") was an "usual covenant," and expressed himself as follows: "How does the history of the law, with reference to this subject, stand? There may be a covenant for almost anything; and this covenant against alienation without licence is as old as *Dumpor's Case* (1), but how does the fact, that there was such a covenant in that case, where it was held to be gone by alienation with licence, prove, that this is a usual, general, covenant in a lease? The conclusion is rather the other way; that this is a special and particular covenant. Consider, how this grows. This covenant, which is represented to be usual, would not prevent underletting. Then is a covenant against underletting a usual covenant? and is it proved to be so by the authorities, that it is not restrained by the other covenant? Farther, if the landlord has a covenant against both assigning and underletting, the tenant might by an agreement, neither assigning, nor underletting, put another person in possession of the premises; and parting with the possession in that manner would not be a breach of those covenants. Is a farther covenant, therefore, not to part with the possession of the premises, to be given, as a usual covenant? That would not have restrained the tenant from parting with a part of the premises: these covenants having been always construed by Courts of Law with the utmost jealousy to prevent the restraint from going beyond the express stipulation": see too *Grove* v. *Portal.* (2)

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(1) 15 Ves. 258, 264.

A covenant against assigning the demised premises, a covenant against underletting the demised premises, and a covenant against parting with the possession of the demised premises are therefore three distinct covenants, though all belonging to the same class, and if there be any other method of disposing of the demised premises that would not amount to an assignment, underletting, or parting with possession, a

(1) (1603) 4 Rep. 119b.

(2) [1902] 1 Ch. 727.

covenant not to dispose of the demised premises would be another and a different covenant of the same class, though including, perhaps, all three of the covenants already mentioned. In the same way, a covenant against sharing the possession is another distinct covenant, for, as already pointed out, a covenant against parting with the possession of the demised premises is not broken by sharing the possession with another. In these circumstances, I do not think that I am justified in treating the sub-section as describing that class of covenant to which all the various species of covenant that I have mentioned belong. The sub-section rather appears to me to be an enumeration of some particular members of that class which it was intended should be excepted from the provisions of the section, to the exclusion of the other members of that class. I cannot believe that the Legislature, while taking care to make it clear that covenants against underletting or against parting with the possession of the demised premises should be as much within the exception as covenants against assigning the demised premises, would have omitted the words "sharing the possession" otherwise than intentionally.

I come therefore to the conclusion that the words in sub-s. 6 (i) of s. 14 of the Conveyancing Act, 1881, to which I have referred, cannot be construed so as to include a covenant or condition against sharing the possession, and accordingly that the plaintiff's right of re-entry or forfeiture for the breach of the covenant against sharing the possession of the demised premises, or any part thereof, is not at the present moment enforceable having regard to the provisions of sub-s. 1 of s. 14 of the Conveyancing Act, 1881.

In these circumstances I have no option but to dismiss the plaintiff's action.

Solicitors for the plaintiff: *Whitgreave, Mack & Co.*
Solicitors for the defendant: *Windsor & Brown.*

R. M.

DUFF DEVELOPMENT COMPANY, LIMITED *v.* GOVERNMENT OF KELANTAN, AND THE CROWN AGENTS FOR THE COLONIES (GARNISHEES).

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Oct. 27, 31; *Nov.* 3, 21.

[1921. D. 3165.]

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International Law—Jurisdiction—Independent Sovereign State—Immunity—Submission—Waiver of Protection—Order for Payment of Costs—Legal Execution—Garnishee Order—Rules of the Supreme Court, 1883, *Order* XLV., *r.* 5.

In proceedings in the Courts of this country by or against the ruler of a colonial State whose status is disputed a written statement by the Secretary of State for the Colonies that the ruler is an independent foreign sovereign is equivalent to a communication from the Crown and, therefore, conclusive, and the Court will accept it without considering whether it is borne out by documents which are appended to it.

Mighell v. *Sultan of Johore* [1894] 1 Q. B. 149 and *The Gagara* [1919] P. 95 followed.

In an arbitration in this country between the plaintiff company and the Government of Kelantan an award was made in favour of the company with costs. The Government of Kelantan then moved to set aside the award and this motion was dismissed with costs. An appeal from this decision was also dismissed with costs. No portion of these costs had been paid. The company obtained a garnishee order nisi to attach moneys in the hands of the Crown agents of the Colonies on behalf of the Government of Kelantan. Upon an application by the company for payment by the garnishees the Government of Kelantan and the Crown agents appeared together and contended that Kelantan was an independent sovereign State and the Court had no jurisdiction to execute the orders for costs by a levy on the property of that State:—

Held, that although the Government of Kelantan had, by initiating proceedings to set aside the award of the arbitrator, submitted to the jurisdiction of the Court, that submission had not the effect of rendering liable to execution any property belonging to the Government within the jurisdiction.

Decision of Russell J. affirmed.

MOTION.

This was a motion by the plaintiff company as judgment creditors for an order upon the Crown Agents for the Colonies, as garnishees, to pay a sum due to the plaintiff company by the Government of Kelantan as judgment debtors.

At some time before February, 1921, the Government of Kelantan granted certain concessions to the plaintiff company.

Those concessions were afterwards surrendered, and as part of the arrangement for the surrender the Government of Kelantan agreed to advance to the company two sums, one of 22,500*l.* and another of 30,000*l.* This agreement was carried out by two deeds dated respectively February 4, 1921, and July 21, 1921. The money so advanced was borrowed by the Government of Kelantan from the Government of the Federated Malay States. The first deed was made between the Duff Company and the Crown Agents acting for and on behalf of the Government of Kelantan and was in these terms: It recited that the Government "has agreed with the Company to advance to the Company the sum of 22,500*l.* upon having the repayment thereof with interest thereon at the rate hereinafter mentioned secured in manner hereinafter appearing Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the sum of 22,500*l.* on or before the execution of these presents paid by the Government to the Company (the receipt whereof the Company doth hereby acknowledge) the Company hereby covenants with the Government to pay to the Government at the office in London for the time being of the Crown Agents on the 30th day of June next the sum of 22,500*l.* with interest thereon in the meantime at the rate of 6*l.* per cent. per annum from the date of these presents and further if the said sum of 22,500*l.* shall not be so paid to pay to the Government interest at the rate aforesaid by equal half yearly payments on the 30th day of June and the 31st day of December in every year on the principal moneys for the time being remaining owing on this covenant or on any judgment which may be recoverable hereafter provided always that if the Company shall on every half yearly day on which interest is hereinbefore made payable until the 31st day of December 1935 or within 14 days after each of such days respectively pay to the Government interest for the principal moneys for the time being remaining owing to the Government hereunder at the rate aforesaid and if the Company shall not enter into liquidation whether compulsory or voluntary (except in the latter case for the purpose of amalgamation

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or reconstruction) then the Government shall not before the 31st day of December 1935 call in the said sum of 22,500*l*. or any part thereof provided also and it is hereby further declared that the receipt in writing of the Secretary for the time being of the Crown Agents shall be a good or effectual discharge to the Company for all principal moneys and interest which shall be paid by the Company in discharge of their indebtedness whether principal money or interest hereunder." The second deed, of July 21, 1921, was in similar terms, securing the loan of 30,000*l*. from the Government of Kelantan to the plaintiff company with interest at 7 per cent.

An arbitration afterwards took place in this country between the Government of Kelantan and the plaintiff company. By his award dated November 17, 1921, the arbitrator, Sir Edwin Speed, awarded costs to be paid by the Government of Kelantan to the company. These costs were taxed at 4450*l*. 19*s*. 11*d*. The Government of Kelantan, being dissatisfied with the award, moved in the Chancery Division to set it aside. The motion was, on March 23, 1922, dismissed with costs. Those costs were taxed at 599*l*. 12*s*. The Government of Kelantan appealed, and on May 24, 1922, the Court of Appeal affirmed the order of March 23, 1922, and ordered the Government to pay the company's costs of the appeal. Those costs were taxed at 586*l*. 9*s*. 9*d*. The three sums of costs amounted to a total of 5637*l*. 1*s*. 8*d*.

No portion of the 5637*l*. 1*s*. 8*d*. had been paid.

On June 30, 1922, an instalment of interest upon the advances under the two deeds, amounting to 1725*l*., became due, and on June 27, 1922, the Duff Company wrote a letter to the Crown Agents for the Colonies in these terms: "You are no doubt aware that on the 1st proximo a half year's interest, amounting to 1725*l*. becomes due from us to the Government of Kelantan in respect of the advances of 52,000*l*. from the Government of Kelantan to ourselves. You are no doubt also aware that in the recent arbitration held by Sir Edwin A. Speed between the Government of Kelantan and ourselves, the Arbitrator awarded the costs of the arbitration to us,

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and these costs have been taxed at the sum of 4450*l*. 19*s*. 11*d*. In addition to these costs there are the costs of the Government's appeals to the Chancery Division of the High Court of Justice and to the Court of Appeal, which have not yet been taxed. We presume we shall be in order in treating the interest due from us on the 1st proximo as a part payment of the taxed costs due to us, but in order that there may be no misunderstanding, we shall be obliged if you will confirm." That was answered on June 30, 1922, by the Crown Agents in these terms: "In reply to your letter of June 27, on the subject of the interest due to the Government of Kelantan on July 1 in respect of the advances totalling 52,000*l*. made by the Government to your Company, I have to inform you that we have no instructions to agree to any such proposal as that made in the third paragraph of your letter and that we must therefore require payment of the interest in question on the due date." The interest was duly paid to the Crown Agents by a cheque of the plaintiff company for 1725*l*.; on July 10, 1922, a receipt was given; on July 11, 1922, the company's cheque was cashed. Accordingly, so far as the company were concerned, or knew, the Crown Agents held money due by the Crown Agents to their principals, the Government of Kelantan. On July 15, 1922, the company obtained a garnishee order nisi attaching all debts owing from the Crown Agents to the Government of Kelantan to answer the orders of March 23, 1922, and May 24, 1922; and on July 17, 1922, the order nisi was served on the garnishees. Further letters referred to in the course of the case, in particular one from the Secretary of State for the Colonies relating to the status of the Government of Kelantan, sufficiently appear from the judgment of Russell J. (infra). The Crown Agent for the Colonies, Sir Henry Lambert, made an affidavit on behalf of the defendants as to the dealings of the Crown with the Federated Malay States and the Government of Kelantan, and was cross-examined upon it by counsel for the plaintiffs.

The motion came on for hearing before Russell J. on October 27, 1922.

Maugham K.C. for the applicants. There was at the date of the garnishee order nisi a debt due by the Crown Agents to the Government of Kelantan. On the correspondence it is clear that the Crown Agents were instructed to arrange for an advance by the Government of Kelantan to the Duff Development Company, and there is no pretence for saying that the Government of Kelantan were trustees of this money for the Federated Malay States. In the first instance there was an advance by the Federated Malay States to the Government of Kelantan and then two advances from that Government to the plaintiff company on the terms of the two deeds of February 4, 1921, and July 21, 1921. The money in dispute was due to the Government of Kelantan but payable to the Crown Agents for the Colonies. It is impossible for them to say now that by means of the entries made in their books without the authority of the Government of Kelantan, they had transferred these sums to the credit of third parties, and to say that there is nothing on which the garnishee proceedings can issue. *Tassell* v. *Cooper* (1) is a much stronger case than this and shows the authority, if any were needed, for these proceedings. On the whole of the facts before the Court there is nothing to justify the assertion that the Federated Malay States have any right to this money as trust money, and the order nisi ought to be made absolute.

Upjohn K.C. and *W. E. Vernon* for the defendants. It would be contrary to all principles of justice to order this money to be paid to the Duff Development Company without giving the Federated Malay States Government an opportunity of proving the actual facts to the Court. Rule 5 of Order XLV. of the Rules of the Supreme Court provides for the case where a third party has a lien or charge upon a debt; and enables the Court to order such third party to appear and state the nature of his claim. The Crown Agents are not here in the first instance to contest the question to whom the money belongs. It is in the discretion of the Court to make the order suggested.

On this preliminary objection the case of *Roberts* v.

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(1) (1850) 9 C. B. 509.

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Death (1) is an authority on the earlier rule which is practically in similar terms. That case established that the Court will not under garnishee proceedings take one man's money to pay another's debt. Our submission is that the Crown Agents did not hold this sum of interest as agents for the Kelantan Government, but as agents for the Federated Malay States, as their accounts showed.

The Crown Agent for the Colonies in his evidence said that he had no communication with the Kelantan Government. There is ground for saying therefore that the Federated Malay States ought to have the opportunity of putting the true facts before the Court. Upon the merits of the case the first point is that under Order XLV., r. 1, there must be a "debt owing or accruing," and the leading authority on that is *Webb* v. *Stenton.* (2) The applicants have not proved a debt due and payable in presenti. There is no relation of debtor and creditor between the Colonial Office acting through the Crown Agents and the Government of Kelantan; it is a case of Government administration. A second point is that as the Federated Malay States are not here it is for the defendants as their General Agents to put it for them. The Crown Agents rely on *Hancock* v. *Smith.* (3) It is not, like *Tassell* v. *Cooper* (4), relied on by the other side. On the evidence this money never was Kelantan money in the sense that it has to be for the purpose of the garnishee proceedings. But lastly, if this money were proved to be money in the hands of the Crown Agents for the Government of Kelantan, we rely on the fact that Kelantan is an independent sovereign State and there is no jurisdiction in the Court, if it decides against the State, to execute the judgment for costs by levying on the public property of the State in this country. It is not a case of the private property of the Sultan. The chief authorities on this point are *Vavasseur* v. *Krupp* (5); *Mighell* v. *Sultan of Johore* (6); and *The Parlement Belge.* (7)

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(1) (1881) 8 Q. B. D. 319.
(2) (1883) 11 Q. B. D. 518.
(3) (1889) 41 Ch. D. 456.
(4) 9 C. B. 509.
(5) (1878) 9 Ch. D. 351.
(6) [1894] 1 Q. B. 149.
(7) (1880) 5 P. D. 197.

The Court does not, in accordance with the international comity established in these and other cases, use the process of execution to interfere with the public property of an independent State.

Maugham K.C. in reply. This defence of the Government of Kelantan being an independent sovereign State is wholly different from the case stated in the affidavit of Sir Henry Lambert. But, assuming that Kelantan is an independent State the principles of law applicable to such a condition are laid down in Westlake's Private International Law, 6th ed., p. 262, where the *Duke of Brunswick* v. *King of Hanover* (1) is quoted. There is no jurisdiction in this Court to make the Sultan of Kelantan a party at all in invitum. But here the Government of Kelantan has submitted to the jurisdiction down to the date of this trial, and the objection was not raised until the end of the defence in this Court.

That Government initiated the proceedings to set aside the award made against them, and that implies a submission to an order which can be made effective. A foreign sovereign may be made to give security for costs, and that involves the liability to pay costs : *Republic of Costa Rica* v. *Erlanger*. (2) He may also remove his property from the jurisdiction : *Vavasseur* v. *Krupp*. (3) The Court does interfere with the dignity of a foreign potentate. There is no authority which says that proceedings of this sort will not lie even when directed against an independent sovereign State : Westlake, p. 260. Therefore even if the letter of the Colonial Secretary is correct, the foreign State here having submitted to the jurisdiction the Court is able to do complete justice to the defendant in the action, without infringing the privileged position of the State, and it is not bound to appear on the summons : *The Newbattle*. (4) Here there has been a waiver of the privilege which is conclusive : *Lariviere* v. *Morgan* (5) ; Westlake, p. 263.

Cur. adv. vult.

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(1) (1844) 6 Beav. 1, 39.
(2) (1876) 3 Ch. D. 62.
(3) 9 Ch. D. 351.
(4) (1885) 10 P. D. 33.
(5) (1872) L. R. 7 Ch. 550.

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Nov. 21. RUSSELL J. The Duff Company ask in the present application for an order on the garnishees to pay the 1725*l.* to them or so much thereof as may be sufficient to satisfy the said two orders of March 23, 1922, and May 24, 1922, together with the costs of these proceedings. The Government of Kelantan and the Crown Agents appear together and resist the application. They say that the 1725*l.* received by the Crown Agents does not belong, and never did belong, to the Government of Kelantan. Sir Henry Lambert in his affidavit goes so far as to say that the Crown Agents have not, and never have had, in their care, custody or control any moneys belonging to the Government of Kelantan, and that so far as the sum of 1725*l.* was at any time in their hands it was not in their hands as Agents for the Government of Kelantan, but it was in their hands on behalf of the Federated Malay States.

The case suggested is either that the loans covered by the two deeds of February 4, 1921, and July 21, 1921, were not an advance to the Duff Company by the Government of Kelantan, but by the Federated Malay States; or that the name of the Government of Kelantan only appears in the deeds as the nominee of and trustee for the Federated Malay States; or that even if there was in fact a loan by the Government of Kelantan to the Duff Company, the Federated Malay States advanced the moneys to the Government of Kelantan for the purpose of being lent by the Government of Kelantan to the Duff Company, and in these circumstances the two loans are so closely connected that the interest paid by the Duff Company to the Government of Kelantan became immediately on payment the property of the Federated Malay States. How the last mentioned result was brought about in law was not very clearly indicated, and one is naturally tempted to inquire whether upon all or any of these suggestions in the event of the Duff Company making default as to principal or interest the loss would fall on the Federated Malay States as between them and the Government of Kelantan. However, those are the suggestions put forward, and I am asked to exercise the powers of this Court under

Order XLV., r. 5, and order the Federated Malay States to appear and state the nature and particulars of their claim. If I were satisfied that any reasonable or plausible foundation existed for these suggestions, or that the full facts were not before me, I would hesitate before refusing such an application. But all the relevant facts must be known to the parties before me. The garnishees are themselves the General Agents for the Federated Malay States in this country where the loans were carried out. The other parties to the loans are parties to this application. More than three months elapsed between the commencement of the garnishee proceedings and the hearing before me. The relevant facts have been put in evidence and I am quite satisfied that they give no colour to the suggestion that this sum of 1725*l.* was not on July 15, 1922, moneys in the hands of the Crown Agents belonging to the Government of Kelantan. The only foundation for the affidavit filed on behalf of the Crown Agents is the fact that (not being General Agents for the Government of Kelantan) they keep no account against that Government in their books, but they elected as a matter of book-keeping to credit the sums to the Federated Malay States in their account with them. They clearly received the 1725*l.* on behalf of the Government of Kelantan, and they could not as against that Government, without that Government's authority, make the 1725*l.* the property of the Federated Malay States. No evidence of any such authority was given or suggested before me. Indeed, Sir Henry Lambert, in his oral evidence, said plainly: "We had no communications with Kelantan as to principal or interest under O.T.1 and O.T.2" (the two deeds in question). "We had no authority or communication of any sort from the Government of Kelantan as to the 1725*l.* We never had any communication from the Kelantan Government about the interest."

Upon the question whether the Federated Malay States were the owners of the interest paid by the Duff Company to the Crown Agents the documents make it quite clear that the relationship of debtor and creditor did not exist between the Duff Company and the Federated Malay States, and that the loan was made to the Duff Company by the Government of Kelantan, although no doubt out of moneys advanced to the Government of Kelantan by the Federated Malay States.

I will now refer to the documents :—

(1.) On February 4, 1921, the Colonial Office wrote to the Crown Agents upon the occasion of the first loan of 22,500*l.* a letter in which are stated the arrangements come to between the Duff Company and the Government of Kelantan, which include as the consideration moving from the Government of Kelantan to the Duff Company, "the payment from Kelantan funds of 12,500*l.*, the grant of a loan of 22,500*l.* for 15 years at 6 per cent. and Agricultural grants." The letter continues : "Both sums to be payable in England upon the execution of the deed and the funds will be lent to the Government of Kelantan by the Federated Malay States Government." Nothing could be plainer than that the Federated Malay States were going to lend the Government of Kelantan the two sums of 12,500*l.* and 22,500*l.* and that the Government of Kelantan were going to lend the Duff Company a sum of 22,500*l.*

(2.) This transaction of loan was carried out by the deed O.T.1, which is equally clear in its terms.

(3.) On June 1, 1921, the Colonial Office wrote a letter to Mr. Duff from which it appears that a further loan of 30,000*l.* is to be made to the Duff Company by the Government of Kelantan, the necessary funds for which are being lent to the Government of Kelantan by the Federated Malay States.

(4.) On July 2, 1921, the Colonial Office wrote a letter to the Crown Agents in reference to this second loan of 30,000*l.* enclosing a copy of a letter from the Colonial Office to Messrs. Burchells. This latter document shows that the loan of 30,000*l.* to be made to the Duff Company is to be in substitution for the cash payment of 12,500*l.* previously agreed upon. From this and other expressions in the letter it is clear to me that the 30,000*l.* was to be advanced to the Duff Company by the Government of Kelantan.

(5.) This second loan was carried out by the deed "O.T.2," which clearly shows such a loan.

(6.) The entries in the books of the Crown Agents relating to the loans of 22,500*l.* and 30,000*l.* describe them in terms which show that the Government of Kelantan were the lenders. Indeed the entry relating to the payment of 1725*l.* (see Ledger No. 2, folio 94) describes it as "Interest due . . . . on advances totalling 52,500*l.* made by the Government of Kelantan."

(7.) In the letter of June 30, 1922, written by the Crown Agents to the Duff Company they refer to "The interest due to the Government of Kelantan on July 1 in respect of the advances totalling 52,500*l.* made by the Government to your Company." In the face of these documents it is difficult to see how the Crown Agents can reasonably suggest that the 1725*l.* was received by them otherwise than on behalf of and as moneys belonging to the Government of Kelantan.

Certain documents were relied upon as showing the contrary. One was a letter of October 25, 1921, written from Kuala Lumpur by the Federated Malay States to the Crown Agents. It is in the following terms: "With reference to the loan of 22,500*l.* at 6 per cent. per annum made by you from Federated Malay States funds to the Duff Development Company on February 4, 1921, I am directed to inform you that the Duff Development Company prefers to pay the interest on this loan direct to you as each instalment falls due, and to express this Government's agreement to that arrangement. It has been noted that interest on this amount, for the period February 4 to June 30, 1921, was collected by you and credited to the Federated Malay States in your July accounts." That merely shows that the Duff Company were going to exercise their power under "O.T.1" to pay interest in London to the Crown Agents. The reference to a loan from Malay States funds to the Duff Company is a loose reference to the fact that the Government of Kelantan had been financed by the Federated Malay States for the purpose of the loan by the Government of

Kelantan to the Duff Company. The last paragraph is an allusion to what is now known to have been the practice of the Crown Agents in keeping their books. Reliance was also placed on a letter of February 8, 1922, from the Crown Agents to the Under-Secretary of the Federated Malay States, the concluding paragraph of which runs: "I take the opportunity to add that the following further payments have been made to us by the Company: (1.) 675*l.*, being interest at 6 per cent. per annum on the first loan of 22,500*l.* for the half-year ended December 31, 1921. (2.) 937*l.* 16*s.* 2*d.* being interest at 7 per cent. per annum on the second loan of 30,000*l.* from July 21 to December 31, 1921. These two amounts will be found credited in our account for January." That again is a reference to the book-keeping practice, but it is a curious fact that while the receipt given by the Crown Agents for the 937*l.* describes it as a sum due to the Government of the Federated Malay States, the receipt given by them for the 675*l.* describes it as a sum due to the Government of Kelantan. The true position seems to me plain—namely, that although the sums received by the Crown Agents from the Duff Company were in fact and in law the moneys of the Government of Kelantan and were received by the Crown Agents on behalf of that Government, the Crown Agents, having no account with that Government in their books, wrongly took a book-keeping short cut and credited the sums to the Federated Malay States. This they did without any authority from the Government of Kelantan, and this faulty book-keeping cannot, in my opinion, alter the legal position and convert the property of the Government of Kelantan into property of the Federated Malay States. Accordingly I decide that on July 17, 1922, the 1725*l.* was money in the hands of the Crown Agents due by them to the Government of Kelantan.

There remains for consideration a further point. Counsel for the Government of Kelantan and the Crown Agents contended before me that Kelantan is an independent sovereign State, and there is no jurisdiction in this Court to execute its judgment by levying on the property of that

State. In support of the view that Kelantan is an independent sovereign State a letter was read from the Secretary of State for the Colonies addressed to one of the Masters of the King's Bench Division. The letter is in the following terms: "With reference to your letter of July 31, I am directed by Mr. Secretary Churchill to inform you, in reply to your letter of July 18, that Kelantan is an independent State in the Malay Peninsula and that His Highness the Sultan Ismail bin Almerhum Sultan Mohamed IV. is the present sovereign ruler thereof. (2.) Prior to the year, 1909, the relations between Siam and Kelantan were regulated by an agreement signed in 1902, a copy of the English text of which is enclosed. Such rights as the King of Siam possessed over Kelantan were transferred to His Majesty the King by a treaty signed at Bangkok on March 10, 1909. A copy of this treaty is enclosed. (3.) Not all the rights possessed by the King of Siam were ever exercised by His Britannic Majesty and the present relations between His Majesty the King and the Sultan of Kelantan which are those of friendship and protection are regulated by an Agreement signed on October 22, 1910. A copy of this agreement is enclosed. His Majesty the King does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan. (4.) I am to explain that in 1910, the Rajah of Kelantan with His Majesty's approval assumed the title of Sultan and is now Sultan and Sovereign of the State of Kelantan. (5.) The Sultan in Council makes laws for the Government of the State, and His Highness dispenses justice through regularly instituted Courts of Justice, confers titles of honour and generally speaking exercises without question the usual attributes of sovereignty." The enclosures in the letter when perused certainly afford considerable material for contending that a conclusion different to that set forth in the letter might have been arrived at. But, however that may be, the letter definitely states that Kelantan is an independent State, that Sultan Mohamed IV. is the present sovereign ruler thereof, that His Majesty the King does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan, and that the

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Sultan in Council makes laws for the government of the State, and His Highness dispenses justice through regularly instituted Courts of justice, confers titles of honour, and generally speaking exercises without question the usual attributes of sovereignty. This letter has the same effect as a communication from the King, and is conclusive that Kelantan is an independent sovereign State: see *Mighell* v. *Sultan of Johore.* (1)

In support of the view that, in those circumstances, this Court had no jurisdiction to make the order asked for, reliance was placed upon the decisions in *Vavasseur* v. *Krupp* (2) and *The Parlement Belge* (3), and the principles therein laid down. These principles are concisely summarized by Brett L.J. when delivering the judgment of the Court of Appeal in the latter case in the following words: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

In the *Sultan of Johore's Case* (4) the same learned judge (then Master of the Rolls) cites that passage and adds: "It appears to me that, by the authority of this Court, the rule was thus laid down absolutely and without any qualification. We had not then to deal with the question of a foreign Sovereign submitting to the jurisdiction; everybody knows and understands that a foreign Sovereign may do that."

In the case before me the foreign sovereign has submitted to the jurisdiction in this sense, that the Government of

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(1) [1894] 1 Q. B. 149.
(2) 9 Ch. D. 351.
(3) (1880) 5 P. D. 197, 214.
(4) [1894] 1 Q. B. 149, 159.

Kelantan was the initiator of the proceedings in this Court and in the Court of Appeal which resulted in the orders of March 23, 1922, and May 24, 1922. Does this submission involve a waiver of the protection afforded by international comity to the property of a foreign sovereign State? That appears to me to be the real point for decision.

It was argued before me that the true doctrine is that the sovereign State and its property are immune from litigious attack in invitum; but that when a sovereign State has initiated proceedings here and has been condemned in costs the Court can enforce the order to pay costs by attaching property of the State in the hands of a third party. Reliance was placed on a passage in Westlake (Private International Law, 6th ed., s. 193, p. 262) in which the author, after citing the words of Lord Langdale in the *Duke of Brunswick* v. *King of Hanover* (1), uses the following language: "If the Plaintiff can establish a right in the nature of property or hypothecation to the money or things which the agent holds in his hands within the Realm, the matter falls under the same principle as the class of cases in which a Court has to distribute a fund. There is in fact a fund within the jurisdiction, the rights in which the Court cannot refuse to declare and carry into effect, without a denial of justice similar in kind to that which would take place if the Court refused to deliver land to one claiming it by a title superior to that of a foreign Sovereign, or to foreclose a mortgage of land against a foreign Sovereign. And there would be this further circumstance in favour of exercising the jurisdiction, that it would be unnecessary to sue the foreign Sovereign, because the movables could be reached through the agent, who would be protected against his principal by the judgment. But if the plaintiff only claims by virtue of an obligation alleged to exist on the part of the foreign Sovereign or State, he can no more pursue that claim indirectly through the agent than he could do so directly; and he is defeated by the refusal or omission of the foreign Sovereign or State to appear and consent to be bound."

(1) 6 Beav. 1.

The present garnishee proceedings, however, are not proceedings in which the Duff Company is attempting to enforce an already existing right to the moneys of the sovereign State in the hands of the State's agent here. They are proceedings by virtue of which the Duff Company seeks for the first time to acquire such right. The Court is asked by the garnishee proceedings not to declare a right and enforce it but to confer a right and enforce it. That the Court can declare a right of property in moneys of a sovereign State in the hands of some one here and enforce it against such moneys I have no doubt. *Lariviere* v. *Morgan* (1) is an instance of this; and the principle of Lord Hatherley's decision is untouched by the reversal of the decree in the House of Lords. But it is an entirely different proposition to say that the Court can for the first time create such a right and then proceed to enforce it. It appears to me that before the Court can do this against a sovereign State the sovereign State must have submitted to the jurisdiction for that purpose.

Has the Government of Kelantan done so here? In my opinion it has not. Judgment and execution are two different things. The Government of Kelantan submitted to the jurisdiction so as to enable the Courts of this country to pronounce the decisions of March 23, 1922, and May 24, 1922. So long as those orders stand the Government of Kelantan is concluded as to the validity of the award and as to its liability to pay the Duff Company's costs, but in my opinion the liability of the Government of Kelantan under those orders is limited to the extent to which (to use the language of James L.J. in *Vavasseur* v. *Krupp* (2)) "they can be enforced against a Sovereign as to costs and otherwise." The initial submission to the jurisdiction does not extend beyond that and does not preclude the sovereign State from now invoking that international comity which induces this country to decline to exercise by means of its Courts any of its territorial jurisdiction over the property of a sovereign State within its territory.

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(1) L. R. 7 Ch. 550.

(2) 9 Ch. D. 351, 356.

This decision, no doubt, involves hardship on the Duff Company. If any suspicion of the sovereignty of the State of Kelantan had existed the Duff Company might have applied for and obtained security for costs. In view of the amounts at which those costs were taxed, the security ordered would, I doubt not, have been seriously insufficient, but it would have been something. As matters stand the only remedy of the Duff Company appears to be to take advantage of such procedure as may be open for the purpose in those regularly instituted Courts of justice through which (as the Secretary of State for the Colonies asserts) His Highness the Sultan of Kelantan dispenses justice in his sovereign State.

The result is that the application fails and must be dismissed. I dismiss it, however, without costs. The point of sovereignty was taken for the first time before me at the close of counsel's argument. The bulk of the time was spent, and the greater proportion of the costs was incurred, in regard to the other points in the case upon which the Duff Company succeeded.

G. M.

C. A.

The plaintiffs, the Duff Development Company, appealed. The appeal came on for hearing on January 15, 1923.

Maugham K.C. and *Hon. R. Stafford Cripps* for the appellants. Russell J. was wrong in holding (1.) that the Government of Kelantan was to be taken in this Court to be an independent sovereign State, and, (2.), that being an independent sovereign State, the Sultan of Kelantan was entitled, though at the eleventh hour, to rely on his privilege of sovereignty which he had previously waived by appearing within the jurisdiction and making an application to the Court.

On the first question it is submitted that, on the letter of the Secretary of State taken with the documents therein incorporated, the Government of Kelantan is not, in the meaning which the Court attaches to the phrase, an independent sovereign State. The agreement of October 22, 1910, between Great Britain and Kelantan which is one of the documents incorporated contains an important provision under which the Sultan of Kelantan engages to follow and give effect to the advice of a British officer. This is inconsistent with Kelantan being an independent sovereign State. Although it is difficult to define what is an independent sovereign State it is submitted that in these Courts the expression is used as indicating a State which is entitled in the view of the Court to be free from the jurisdiction of the Court on the ground of its sovereignty. That cannot be the position of the Government of Kelantan, which is bound at the mere will and pleasure of a Department of State of this country—namely, the Colonial Office—to submit to the jurisdiction whenever this country thinks fit to compel it to do so.

In *Mighell* v. *Sultan of Johore* (1) it was held that the facts stated in the certificate by the Secretary of State were decisive that the Sultan was an independent sovereign. But it is submitted that Kay L.J. at any rate reached that conclusion by taking into consideration not only the fact stated but also the documents there referred to. It is submitted that if the Court has before it a certificate like that in the present case embodying a number of documents it is not to take the opinion of the Secretary as to what constitutes sovereignty or independent sovereignty as binding upon it. It is bound, no doubt, to accept his positive statement of fact, as being correct, but when he states, as he does here, his view that the Sultan of Kelantan is an independent sovereign and puts forward documents which show that he had taken a wrong view of what sovereignty consists, the Court is entitled and indeed bound to say that although it accepts the statements of fact in his letter as correct, it comes to the conclusion that he has been wrongly advised as to what constitutes an independent sovereign from the point of view of the Court.

Whatever the Secretary of State may have said in this matter as to his view in regard to the relation of sovereignty, it is absolutely wrong, as a matter of international law, to say that a sovereign who, on the one hand, is precluded from making treaties with others, except with the consent of Great Britain, and who, on the other, is practically bound in every internal matter to follow the advice of an officer of Great Britain, is an independent sovereign. Further, in a case where the Government of this country is entitled to compel the submission to jurisdiction of the alleged sovereign, it is absolutely wrong and contrary to principle to say that such a sovereign is entitled at any moment to allege that he is not subject to the jurisdiction of the Court.

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(1) [1894] 1 Q. B. 149.

Reading the letter of the Secretary of State together with the documents incorporated therewith its only possible consistent meaning is that the independence of the Sultan of Kelantan is not such as to free him from the jurisdiction of these Courts.

[They also referred on this point to *Taylor* v. *Barclay* (1) and *The Gagara.* (2)]

The second question is whether an independent sovereign, having submitted to the jurisdiction in litigation in this country, is entitled, when judgment against him comes to be enforced, to withdraw from his submission and to claim to be beyond the jurisdiction of the Court. It was long ago held that from the point of view of foreign sovereigns themselves it might be essential that they should be allowed to submit to the jurisdiction in order to sue. The decision in *The Parlement Belge* (3) establishes that the true position of the doctrine upon which is founded the right of the sovereign to say "I am not bound to obey the orders of the Court" is simply this, that he is beyond the jurisdiction altogether and is entitled, if he pleases, to say, "I do not recognize your Courts and I will not plead before your tribunal."

But it was long ago pointed out that it might be essential to a king that he should be able to sue in these Courts or to intervene in proceedings in which he was in some way indirectly affected, and in either case it has long been held

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(1) (1828) 2 Sim. 213, 220.

(2) [1919] P. 95, 100.

(3) 5 P. D. 197.

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that although prima facie the Court has no hold over him at all if he chooses to say "I am a sovereign," yet if he comes in, according to many dicta, he is to be treated as an ordinary litigant. There have been a number of cases in which independent sovereigns have been awarded costs and have been directed to pay costs. The principle upon which that has been done is concisely stated in Westlake's Private International Law, 6th ed., s. 192, p. 259, as follows: "But a foreign state or person entitled to the privilege of exterritoriality, bringing an action in England, will be bound as a private corporation or person would be bound to do complete justice to the defendant with regard to the matters comprised in the action, and will be subject to all cross actions, counterclaims, defences and steps of procedure which as between private parties would be competent to the defendant for the purpose either of obtaining such complete justice or of defending himself against the plaintiff's claim. It was the old maxim of the Court of Chancery that he who seeks equity must do equity; and Paulus says qui non cogitur in aliquo loco judicium pati, si ipse ibi agat, cogitur excipere actiones et ad eundem judicem mitti." And see note thereto. Up to the present time, when foreign potentates have been ordered to pay costs, no question has arisen, and no sovereign has ever alleged that he was not bound to comply with the order of the Court.

[WARRINGTON L.J. Does the Government of Kelantan say here that it is not bound to comply with the order?]

It says that it is not effectively bound.

[WARRINGTON L.J. That is quite a different thing from effecting execution by means of a garnishee order.]

When an independent sovereign submits to the jurisdiction he submits to be bound by any order which the Court may properly make in that jurisdiction and which would be treated as effectual in this country. The High Court of Justice does not adjudicate upon matters with a view of making vesting orders which may be wholly nugatory; it will only undertake jurisdiction or act in a jurisdiction which is submitted to if it can make effective orders.

[WARRINGTON L.J. referred to *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord.* (1)]

In *The Newbattle* (2) it was held that the Court had jurisdiction under 24 Vict. c. 10, s. 34, to order a plaintiff in an action for damages by collision to give security for damages to a defendant who brought a counterclaim and could exercise that power when such a plaintiff was a foreign sovereign whose ship could not be arrested.

[LORD STERNDALE M.R. That case does not decide that a foreign Government which submits to the jurisdiction by bringing proceedings in our Courts puts itself in the position of an ordinary litigant, because, of course, the ordinary litigant could have had his ship seized.]

No doubt that is so, and it is only suggested that as a matter of fact the Court of Appeal in that case did not accept the view that the sovereign prince invoking the jurisdiction of the Court could object that the Court could not make proper orders against him.

[LORD STERNDALE M.R. It did accept this proposition, that by invoking the jurisdiction of the Court the foreign Government did not expose itself to having its property seized. It does not seem to me to go far enough to dispose of your case.]

[YOUNGER L.J. Is there any authority dealing with security for costs which shows the ground on which the security is given as distinct from the value of a ship in the Admiralty case cited ? In the ordinary way a foreign plaintiff is not ordered to give security for costs if he has assets within the jurisdiction.]

Yes. *Republic of Costa Rica* v. *Erlanger.* (3) In that case the security appears to have been ordered on the ground that the plaintiffs were foreign litigants having no property in this country. It has been the common practice to order security for costs against foreign sovereigns who are litigants in this country in exactly the same way and on exactly the same grounds as if they were ordinary litigants. Until this

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(1) [1898] 1 Ch. 190.

(2) 10 P. D. 33.

(3) 3 Ch. D. 62, 68.

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case it appears never to have been suggested that an order for costs against a foreign sovereign in a proceeding where he can submit to the jurisdiction could not be enforced against property in this country: see *Hullet & Co.* v. *King of Spain* (1); *Rothschild* v. *Queen of Portugal.* (2)

Vavasseur v. *Krupp* (3), which was relied upon by the respondents in the Court below, is, if anything, in the appellants' favour. It really does not settle any principle at all. There was not there a complete submission to the Court for all purposes but only for the particular purpose of making the application that was made.

[WARRINGTON L.J. I do not think the case throws much light on what we have to decide.]

It is submitted therefore on the authority of what is stated in s. 192 of Westlake's Private International Law, 6th ed., p. 259, that a sovereign submitting to jurisdiction by entering into litigation here, puts himself, quoad any property of his in this country, in the position of an ordinary litigant so far as all steps of procedure are concerned, including orders for costs.

[On this question of submission to the jurisdiction reference was also made to Dicey on the Conflict of Laws, 3rd ed., pp. 40, 235.]

Upjohn K.C. and *W. E. Vernon* for the respondents.

[LORD STERNDALE M.R. We only wish to hear you upon the point whether by submitting to the jurisdiction the sovereign State thereby submits any property which it may possess within the jurisdiction so far as necessary for the carrying out of any order made in the action.]

[Upon the first point *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor* (4) was referred to.]

On the question of submission to the jurisdiction the principle is that the municipal law of this country recognizes a comity between nations whereby the sovereign and his ambassadors and his and their property are not subject to interference by any other sovereign; and the effect of that comity is expressed by one word—exterritoriality. The true view is that the sovereign, the ambassador and the property are deemed not to be within the jurisdiction at all.

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(1) (1828) 1 Dow. & Cl. 169.
(2) (1839) 3 Y. & C. Ex. 594.
(3) 9 Ch. D. 351.
(4) [1921] 1 K. B. 456.

It is said that submission to the jurisdiction constitutes an admission by the sovereign whose property is in question that that property is for all purposes of jurisdiction brought into the State of England so that it mav be taken in execution. That cannot be successfully argued. As to ambassadors the statute 7 Anne, c. 12, s. 3, is declaratory of the common law and must therefore be construed according to the common law, of which the law of nations must be deemed a part: see the judgment of Swinfen Eady L.J. in *In re Suarez.* (1) The case of a sovereign is a fortiori: *De Haber* v. *Queen of Portugal.* (2) The result is that all processes against the person or the property of the sovereign or his ambassador are null and void unless waiver or submission can be established. The effect of submitting to the jurisdiction is to confer upon the Court the jus dicendi, or the power of declaring the rights. The sovereign by his submission subjects himself to any order which may be necessary for the proper and just determination of the question before the Court. The Court has power to make a declaratory order only. But when the Courts of this Kingdom have declared rights then the party who has obtained a declaration in his favour can go to the Court of the foreign sovereign and ask for effect to be given to it. It is a new cause of action.

The statute of Anne does not affect the jurisdiction to bring an action against a sovereign prince and to obtain judgment; what it affects is the right to seizure of his property by way of execution.

According to the doctrine of exterritoriality as stated in *Magdalena Steam Navigation Co.* v. *Martin* (3) the property of a foreign sovereign is not situate within the territorial limits of this country, and where proceedings are taken against him in these Courts his property cannot be taken in execution. Where a foreign power acquires a London

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(1) [1918] 1 Ch. 176, 192.
(2) (1851) 17 Q. B. 171, 208.
(3) (1859) 2 E. & E. 94, 111.

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residence for the purpose of its Embassy no steps can be taken against that power for payment of rates: Dicey on the Conflict of Laws, 3rd ed., 219. The matter was fully discussed in *De Haber* v. *Queen of Portugal.* (1)

[Lord Sterndale M.R. The point we have to decide is whether an independent sovereign by bringing an action or taking proceedings in the Courts of this country submits himself and his property to what may be necessary to satisfy the judgment pronounced against him in those proceedings.]

It is submitted that that question is determined by the doctrine of exterritoriality laid down in *The Parlement Belge* (2) and other authorities, so that if a foreign sovereign is properly made a party to an action in this country, except so far as he has agreed that his person and property shall be treated as within the territory for the purpose of being subject to process of execution, he and his private property and the public property of his State are protected.

On the facts of this case the proceedings taken by the Government of Kelantan were merely a continuation of a proceeding before a domestic tribunal which had been agreed upon by the parties; they did not involve any abdication of sovereignty or submission to any conflicting jurisdiction: see the judgment of Lord Esher in *Mighell* v. *Sultan of Johore.* (3)

It is said that when a foreign sovereign is a plaintiff in an action here the Court can require him to do all acts which an ordinary suitor is required to do in order that the Court may do complete justice between the parties, and, for that, *Rothschild* v. *Queen of Spain* (4) and other like authorities are relied upon; but that does not extend to levying execution. It does not go beyond discovery, cross-claim or counterclaim. There is no case in which an order has been made against a foreign sovereign committing him for contempt. In *Barbuit's Case* (5) a writ of attachment was issued against an ambassador and dissolved. In *Duke of Brunswick* v. *King of*

(1) 17 Q. B. 171, 204.
(2) 5 P. D. 197.
(3) [1894] 1 Q. B. 149, 159.
(4) 3 Y. & C. Ex. 594.
(5) (1736) Cas. temp. Talbot, 281.

Hanover (1) Lord Langdale M.R. laid it down that in ordinary cases the execution of a decree cannot be enforced against a sovereign prince. The same view was taken by Page Wood V.-C. in *Gladstone* v. *Musurus Bey*. (2)

There are two separate exemptions of which a sovereign State can claim the privilege. First, that he is not subjected to the jurisdiction of this Court at all, but he may waive that by taking proceedings himself or by allowing proceedings taken against him to go to judgment. Secondly, he may claim the privilege that his property cannot be interfered with by legal process of any sort. *The Parlement Belge* (3) deals with the second exemption, but not the first.

In re Suarez (4) before Eve J. strongly supports the respondents' case. It was there decided that when an ambassador in an action against him has submitted to the jurisdiction down to judgment and an order has been made determining his liability to pay money into Court he can still assert his immunity from process by way of execution and set up the statute of Anne as an answer to an application for leave to issue execution against his personal property.

All the authorities were discussed by Astbury J. in *In re Republic of Bolivia Exploration Syndicate*. (5) That was the case of proceedings against a secretary of the Peruvian Legation, and Astbury J. there said: "No judgment or execution can be enforced or levied against him."

If an ambassador or minister has submitted to the jurisdiction he may be too late in applying to have his name struck out or the proceedings stayed, especially if he is being sued jointly with others, as in *Taylor* v. *Best* (6), but even then the statute of Anne will have to be respected as to the execution of any judgment against him: Westlake's Private International Law, 6th ed., para. 194.

The Newbattle (7) is absolutely in point here. See also *The Parlement Belge* (8) and *Vavasseur* v. *Krupp*. (9) The

(1) 6 Beav. 1, 57.
(2) (1862) 1 H. & M. 495.
(3) 5 P. D. 197.
(4) [1917] 2 Ch. 131.
(5) [1914] 1 Ch. 139, 157.
(6) (1854) 14 C. B. 487.
(7) 10 P. D. 33.
(8) 4 P. D. 129.
(9) 9 Ch. D. 351.

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principle to be deduced from all these cases is that as a consequence of the absolute independence of every sovereign authority, and of international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction. That is an absolute rule of international law, adopted by the municipal law of every civilized State, that the Court will not interfere with the person or property of a sovereign prince or his ambassador.

As to the point whether this money was the money of the Federated Malay States:

[LORD STERNDALE M.R. We cannot deal with that now as we have not the materials before us, but you will not be precluded from raising that if the House of Lords were to think we were wrong in holding in your favour on the other points.]

Maugham K.C. in reply.

LORD STERNDALE M.R. I think that this appeal must be dismissed. I am bound to say I should not grieve if some other tribunal took a different view, because I have no sympathy with sovereign States who grant concessions and enter into litigation in respect of commercial transactions, and when they fail say: "It injures our sovereign dignity that we should pay the costs we have been ordered to pay of litigation which we have promoted." I should have thought it was more consistent with sovereign dignity to pay. But the question is whether the Government of Kelantan is an independent sovereign State, and therefore not liable to seizure of its property by way of execution to satisfy the judgment of a Court of this country. [His Lordship stated the facts and continued:]

The money which was advanced by the Government of Kelantan to the Duff Development Company was in fact advanced to the Government of Kelantan by the Government of the Federated Malay States, and the Crown Agents who are mentioned in the deeds of February 4 and July 21, 1921, are the General Agents of the Federated Malay States. They are not the General Agents of the Government of Kelantan, but they do act for them sometimes, and they acted for them in making this agreement.

The garnishee proceedings were opposed by the Government of Kelantan and the Crown Agents, with the result that Russell J. discharged the order nisi, and it is against his decision that this appeal is brought. The Government took more than one point before Russell J. The first was that the 1725*l.* in the hands of the Crown Agents was not money of the Government at all, but was money belonging to the Federated Malay States, and Russell J. thought there was no foundation for that contention. I am not at all prepared to agree with him that there was no foundation for it. Of course, upon these documents there is no question that the Government were the creditors in respect of the principal and interest of the sums they had advanced, and prima facie any money paid by the company to the Crown Agents would be money paid to the Crown Agents for the Government, and would be the Government's money; but the transaction, as I have said, was this. The Federated Malay States found the money which was advanced to the company, and they were to get from the Government the same interest that the Government were to get from the Duff Company, and it may very well be that in those circumstances there was an agreement between the parties that, instead of paying the Government the interest, the Duff Company should pay that interest to the Crown Agents as representing the Federated Malay States, and the Government would acknowledge that payment to the Federated Malay States as a payment which discharged the Duff Company.

I agree there is no evidence of such an agreement, but there are circumstances that make it by no means improbable

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in my opinion. Russell J. said upon that point that if he had thought there was any foundation for the contention that this money was paid to the Crown Agents on behalf of the Federated Malay States, he should have given an opportunity to the Federated Malay States to come in and to assert their claim to it, but as he did not think there was any foundation for it, he did not give that opportunity. It is not necessary in the view we take of the case to decide that point; but if I had taken a different view upon the other points of the case, I certainly should have thought the point one that needed further investigation, and if we should be held to be wrong in the view we take on the other point, I should hope the opportunity would be given to have that matter properly investigated.

The next point taken was that the Government of Kelantan was the Government of a sovereign State, and that the property of a sovereign State cannot be taken in execution at all, whether the form of that execution be a fi. fa., or, in the old days, had been a ca. sa., or whether it be execution by means of garnishee proceedings or any other method of execution.

That involves the consideration of one or two questions. The first is whether the Government of Kelantan is the Government of a sovereign State, and whether the sovereign of Kelantan, who now bears the title of Sultan, having been promoted to that title from that of Rajah, is an independent sovereign within the meaning of the authorities which have dealt with the matter. On that point, in my opinion, I am bound to accept the statement of the Secretary of State for the Colonies that Kelantan is a sovereign State. It is argued that we are not so bound because in the communication which alleges Kelantan to be a sovereign State reasons are given for the statement by referring to a treaty, an agreement and other documents, and it is said that it is our duty to examine those documents in order to see whether they bear out the statement of the Secretary of State that Kelantan is an independent sovereign State. As to whether it is right that such should be the state of the law or not I say nothing, but in my opinion, having regard to decisions which bind us, we have no right to do anything of the sort; we are concluded by the statement of the Secretary of State. That is clearly stated by Lord Esher M.R. in *Mighell* v. *Sultan of Johore.* (1) In that case it is not easy to see what were the documents which were appended to the statement that Johore was an independent State. They are not all set out, but there certainly were some documents, and it was argued, as it was here, that the Court ought to look at those documents and see whether they bore out the statement that was made or not. Lord Esher distinctly says that the statement of the sovereign as represented by the Secretary of State is conclusive. After alluding to the fact that Sir Robert Phillimore had made some examination of the circumstances affecting the alleged sovereign State in the case of *The Charkieh* (2), Lord Esher said (3): "I know he did; but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her Minister of State as to the status of another sovereign, that in the Courts of this country is decisive."

Therefore this letter is conclusive. The defendant is an independent sovereign. Lopes L.J. did not say anything on that point, I think, but Kay L.J., who was the third member of the Court, said (4): "Proceeding as it does from the office of one of the principal secretaries of state, and purporting to be written by his direction, I think it must be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty condescends to state to one of Her Courts of Justice, that an individual cited before it is an independent sovereign, I think that statement must be taken as conclusive." The same thing was stated in *The Gagara* (5), in which Bankes L.J. delivered the only detailed judgment, and in *In re Suarez* (6), by Scrutton L.J. It is quite true that in *Mighell* v. *The Sultan of Johore* (1) and in *The*

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(1) [1894] 1 Q. B. 149.
(2) (1873) L. R. 4 A. & E. 59.
(3) [1894] 1 Q. B. 158.
(4) [1894] 1 Q. B. 162.
(5) [1919] P. 95.
(6) [1918] 1 Ch. 199.

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Gagara (1) Kay L.J. in the one case and Bankes L.J. in the other, after having said that the statement in the letter of the Secretary of State was conclusive, did go on to examine the accompanying documents as it was in the one case, and an additional statement by the law officers of the Crown in the other, and did say that that examination showed the statement in the letter to be right. But neither of those circumstances in any way impaired or detracted from the force of what those learned judges had said before, that the statement was conclusive. If a judge says: "This is conclusive upon me," and then goes on to say: "And in addition on examining it I think it is right," that does not in any way detract from his statement that it is conclusive; and, therefore, on that point it seems to me we are concluded, in this Court at any rate, by authority; we have to accept the statement of the Secretary of State.

We have therefore to accept the statement that this State is a sovereign State, although it is quite true that these documents raise a considerable doubt as to how far that independence is practically asserted and exercised in reality. I have grave doubts myself whether this Sultan of Kelantan has practically any control at all over what is done, he probably has to do what he is told by the High Commissioner of the Federated Malay States and the Colonial Office; but although that may be so we have to accept the statement that Kelantan is an independent sovereign State. If it be an independent sovereign State then prima facie its property is not subject to execution to satisfy any judgment that is given against it by the Courts of this country. I think that is established in *The Parlement Belge* (2), and other cases which have been cited. But the appellants here contend, and it raises a difficult point, that this prima facie state of things does not exist where the sovereign State has itself submitted to the jurisdiction of these Courts, and that wherever a sovereign State has submitted to the jurisdiction of these Courts, it must be taken and held to have submitted to everything that is

(1) [1919] P. 95.

(2) 5 P. D. 197.

necessary to make the decision of these Courts effective, not merely everything that is necessary to enable these Courts to come to a right conclusion, but everything that is necessary to make the decision effective. Therefore, the contention here is, that by submitting to the jurisdiction, by taking these proceedings to set aside the award, the Government of Kelantan impliedly submitted to execution being levied upon their property, so far as it was necessary to carry out the orders that were made by the Courts, in this case the orders for costs. It is a difficult question upon which I think there is no direct authority, and because there is no direct authority it has been necessary to call our attention to what are called indirect authorities; but we start with the principle that the property of an independent sovereign State cannot be taken in execution to answer a judgment of these Courts unless there is something to show that that principle does not apply. It seems to me that no distinction can be drawn between a proceeding by fi. fa. and proceedings such as existed in the time of some of these old cases of ca. sa., or proceedings by way of committal or attachment. It was argued, although I think not very strenuously, that the result of submitting to the jurisdiction of the Court is to put the person who so submits, although he is an independent sovereign, in exactly the same position as any other litigant. That seems to me to have been clearly decided not to be so in *The Newbattle.* (1) In that case the King of the Belgians instituted a suit in Admiralty against the owners of a ship and arrested that ship. The owners then raised a counterclaim against the Belgian ship, and contended that the effect of the submission of the King of the Belgians to the jurisdiction of this Court had been to put him upon the same footing as any other litigant in this Court, when the persons raising that counterclaim would have had the right to arrest the plaintiff's ship. It seems to me however that the judges in *The Newbattle* (1) clearly decided that they had not that right, because they ordered security to be given by the King of the Belgians for the amount of the

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(1) 10 P. D. 33.

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claim, just as it would be given in an ordinary case, and they made it upon the very ground that the ship belonging to the King of the Belgians could not be seized. It was suggested that the learned judges there had not before them any case of submission to the jurisdiction. I have never been able to follow the suggestion because Cotton L.J. expressly mentions the point. He says: "It was decided in *The Parlement Belge* (1) that a ship belonging to the Belgian Government could not be seized when that Government were defendants in an action. But when a Government comes in as a suitor, it submits to the jurisdiction of the Court and to all orders which may properly be made. Regard must of course be had to the fact that in this case the King of the Belgians is a sovereign prince, but the order is nevertheless a proper one. It is a reasonable principle that a plaintiff whose ship cannot be seized, and against whom a cross-action has been brought, shall put the defendant in the same position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security." It seems to me that is the extent to which that case goes—namely, that the sovereign submitting to the jurisdiction of the Court is not for all purposes put in the same position as an ordinary litigant. It does not seem to me to go any further because it is dealing, not with execution upon a judgment but with the arresting of the ship for the purpose of commencing an action in rem. It does, however, contain a broad statement, which is much relied upon, that when a Government comes in as a suitor it submits to the jurisdiction of the Court and to all orders which may properly be made.

What that means has been stated, I think very accurately, in Hall on International Law, 7th ed., p. 180. The learned author says: "In the *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (2) it was held that a foreign sovereign suing in the Courts of this country submitted to the jurisdiction only to the extent that first he must give discovery; secondly, cross-proceedings in mitigation to the relief claimed by him can be taken against him," and in *Rothschild* v. *Queen of Portugal* (1) Alderson B. says very much the same thing. In that case the question was whether a bill for discovery could be filed against a foreign prince who was a suitor in the common law Courts—of course in those days that was the only way in which discovery could be got, and if such a bill could not be filed against him, then he would, although submitting to the jurisdiction and claiming like an ordinary person in the Court, be exempt from doing what was necessary to supply the Court with materials which were necessary for it to come to its conclusion. Alderson B. said: "I am therefore of opinion that Her Most Faithful Majesty"—she was the Queen of Portugal—"being a suitor voluntarily in a Court of English Law, becomes subject, as to all matters connected with that suit, to the jurisdiction of the Court of Equity. That the discovery prayed by this bill is material to the plaintiff's defence at law in that suit, and that this demurrer is too large and must be overruled, and that it must be with costs," and there is a statement in another case to the same effect—namely, that where a sovereign prince submits to the jurisdiction of this Court, he submits to everything that is necessary to enable the Court to come to a right and proper conclusion upon the matters which lie for its decision. But I can find no case at all in which it has been said that he submits to the jurisdiction to this extent, that he submits all property that he may have within the jurisdiction to execution for the carrying out of the order that was given in the suit that he has initiated. There are hints, and I cannot call them more than hints, in some of the cases to which we have been referred, in the direction of the submission not going to that extent. I will give one instance, which occurs in *The Newbattle* (2), where Lord Esher, then Sir W. B. Brett M.R., said: "It has always, however, been held that if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him. The Court has never hesitated to exercise its powers

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(1) 5 P. D. 197.

(2) [1898] 1 Ch. 190.

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(1) 3 Y. & C. Ex. 594, 596.

(2) 10 P. D. 33.

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against a foreign government to this extent. It is another question as to what may be the result when there is an application for execution by seizure of the plaintiffs' ship, if the judgment should be against the plaintiffs." So far as that goes it seems to me that the learned Master of the Rolls did not think that execution would be allowed to issue. James L.J. in another case speaks of submitting to such order as to costs as may be issued against a sovereign prince, or words to that effect, again suggesting a hint that an order for execution for costs which could be used against an ordinary suitor would not be one which could be used against the sovereign prince, who had submitted to the jurisdiction.

Those are the only cases which really seem to me to touch the matter. There are some cases with regard to the case of ambassadors. I do not propose to mention them because I think that the considerations applying to the case of ambassadors under the statute of Anne, which was a declaration of the common law so far as they are concerned, do not necessarily apply to the case of a sovereign, and I do not think there is anything nearer to the case of a sovereign on this question of execution on the ground of submission to the jurisdiction than the cases which I have mentioned.

It seems to me that the only result of the submission, as far as the authorities go, is that the foreign sovereign taking proceedings in our Courts must submit to such orders of the Court as are necessary to furnish the Court with the materials which are necessary in order to enable it to form a proper conclusion in such proceedings, and there is no necessary implication at all that the sovereign, by doing that, also says: "And not only will I submit to that, but I will submit all my property" (I think the argument goes as far as this) "and my person to such consequences as are necessary to carry out the judgment that is given by that Court." It is a serious matter no doubt. It is a serious matter with regard to property, because it would extend, of course, to battleships, the immunity of battleships being not because they are battleships, but because they are the property of a foreign sovereign. It would extend to munitions of war. It would extend also, as was pointed out by Mr. Upjohn, to sums of money which were necessary, perhaps vital, to the existence of the sovereign State, because they could be taken by garnishee proceedings, if they were in this country. It is a very serious matter, and I do not think such a submission should be implied unless there is some authority pointing in the direction of its being necessary to imply it. It is no doubt an important question, and I should not be sorry if the whole subject were reviewed by a tribunal which has power to review it.

I think the consequences I have mentioned follow from the fact that the State is an independent sovereign State, and therefore the order of Russell J. was right, and the appeal should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. With regard to the question whether the money sought to be garnished was in reality the money of the Government of Kelantan or the money of the Federated Malay States, it is unnecessary to express any opinion at all, in the view I take of the other questions that have been raised. Russell J. thought that the matter was so clear that he did not even think it right to afford the representatives of the Federated Malay States an opportunity of appearing to assert their right to the fund. Now if it should happen that our view and our order dismissing the appeal from Russell J. on the grounds on which we propose to dismiss it is not correct, then I hope it will be understood, so far as the opinion of this Court is concerned, that the question whether the title to this fund ought to be further investigated is open.

Subject to that only two other questions have been raised by the appellants. The first is whether the Government of Kelantan is a sovereign State at all. In my opinion we are precluded by authority from refusing to act upon the certificate of His Majesty, communicated through the Secretary of State for the Colonies, that Kelantan is an independent sovereign State. In my judgment it was clearly

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decided in *Mighell* v. *Sultan of Johore* (1) that a similar communication from the Secretary of State was conclusive on the subject. By that we are bound, and I can say nothing more upon that point.

Starting with the assumption that the Government of Kelantan is a sovereign State, the appellants then assert that inasmuch as the Government in this case instituted proceedings against them, and has in the course of those proceedings been ordered to pay costs, it must also be taken to have submitted to such an order as that now in question whereby moneys belonging to the Government in this country may be taken in execution. Russell J. has held that by taking the proceedings in question the submission of the Government does not go so far. I agree with him and I can state my reasons very shortly. The principle is expressed in words far better than any in which I can express it in the judgment of the Court of Appeal in *The Parlement Belge* (2): "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined for the public use, or over the property of any ambassador though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction." The Courts, therefore, of this country have no jurisdiction to make any order the result of which would be to take out of the possession of the sovereign in question property of his in this country. But it is said that that is a privilege which can be waived. As to that it is not disputed that it is a privilege which a sovereign can waive if he pleases. But it is further said that he has waived it, not in express terms, but by waiving another privilege which he enjoys, which is the privilege of not being compelled to make any answer at all to any proceedings in these Courts, or to submit in any way, whether affecting his property or person, to the jurisdiction of these Courts. That last privilege he has waived by commencing the proceedings which he has commenced, and I think there is no question that his submission goes to this extent that by thus commencing proceedings, he empowers the Court to make such orders as would enable the Court to come to the right and proper conclusion and give effect to that conclusion in the matter submitted to it. But there is no authority that goes so far as to say that by submitting to waive the immunity from the jurisdiction of the Courts, the sovereign in question also waives the immunity of his property, or his person, from seizure or attachment as the result of process of the Courts, and in the absence of such authority I think it would be our duty to decline to hold that the submission went to such an extent.

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(1) [1894] 1 Q. B. 149.

(2) 5 P. D. 197, 214.

Not only is there no authority in favour of the view put forward by the appellants, but such authority as there is, though it may not be directly upon the point and may not extend to being a direct decision on the point, so far as it goes indicates that the submission to the jurisdiction of the Courts to entertain a particular question in the litigation, does not amount to a waiver of the immunity of the sovereign from execution upon his property or person. If he did, it would be so exceedingly serious a matter that one cannot help thinking that it must have been at some time or another adjudicated upon. But the suggestions, I think, in some cases, rather more than hints on the part of the judges that do appear in the books, are that the institution of litigation does not amount to a waiver of the immunity to which I have referred; and certainly the case of *The Newbattle* (1) goes a very long way to deciding that the submission does not extend so far, because the King of the Belgians there having commenced proceedings in the Admiralty Court, and having, by doing so, found himself compelled to submit to proceedings for a counterclaim, was ordered under the

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(1) 10 P. D. 33.

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proceedings of the Admiralty Jurisdiction Act, 1861, to give security for damages, and on the very ground that his ship, being a king's ship, was not liable to arrest. However, such authorities as there are seem to me adverse to the appellants here, and the conclusion I have come to is that Russell J. was right in finding that the submission to the jurisdiction of the Court did not amount to a waiver by the sovereign of his right to immunity of his property from seizure. I think the judgment of Russell J. was correct, and the appeal must be dismissed.

Younger L.J. I concur in thinking that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Drake, Son & Parton; Burchells.*

G. A. S.

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[1922. E. 771.]

Landlord and Tenant—Lease—Breach of Covenant—Forfeiture—Mesne Profits—Date from which assessed.

Where in an action brought by a landlord against his tenant to enforce a right of re-entry for breach of covenant, an order is made that the landlord do recover possession of the demised premises and mesne profits, the mesne profits are assessable from the date of the writ in the action and not from the date of the breach of covenant giving rise to the landlord's right to re-enter.

Selby v. *Browne* (1845) 7 Q. B. 620 applied.

The statement of the law in Woodfall's Law of Landlord and Tenant, 20th ed., p. 387, and Cole on Ejectment, p. 408, approved.

Summons.

By a lease dated January 31, 1918, the plaintiff demised to the defendant Boynton and one Dowsett No. 352 Goswell Road, Islington, for the term of fourteen years from December 25, 1917, at the yearly rents of 280*l.* and a sum in respect of insurance premium. The lease contained (inter alia) a joint and several covenant by the lessees not (except by will) to " sublet or part with the possession of the premises or any part thereof without the consent in writing of the lessor first had and obtained but such consent shall not be unreasonably withheld in the case of a respectable and responsible person." The lease also contained the following proviso for re-entry: " Provided always and it is declared that if the said yearly rents hereby reserved or any part thereof shall be in arrear for the space of 21 days . . . . or if there shall be any breach or non-observance of any of the lessees' covenants hereinbefore contained then and in any of the said cases it shall be lawful for the lessor at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in his former estate."

On October 20, 1919, November 3, 1919, and December 15, 1919, the lessees sublet parts of the premises to different persons without asking for or obtaining the consent of the landlord. On December 30, 1919, the plaintiff gave his consent to an assignment of the lease to the defendant Boynton alone and such assignment was duly effected. At this time the plaintiff was unaware of the sublettings effected by the lessees without his consent.

On May 15, 1920, the defendant Boynton sublet another part of the demised premises, and on October 28, 1921, he sublet to another tenant the portion of the demised premises originally sublet on November 3, 1919. The defendant Boynton failed to ask for or obtain the licence of the plaintiff in either case.

In March, 1922, the plaintiff for the first time became aware of these breaches of covenant, and after a short correspondence between the parties he issued a writ on May 12, 1922, against the defendant Boynton and his sub-tenants claiming to recover possession of the demised premises and mesne profits. On June 26, 1922, an order was made that the plaintiff do recover possession from the defendants of the demised premises: " And it is further ordered that the plaintiff do recover against the defendant Albert Edward Boynton mesne profits to be assessed." On December 18, 1922, the Master made a certificate assessing the mesne profits at the sum of 841*l.* This amount was arrived at by assessing the mesne profits as from the date of the first breach of covenant on October 20, 1919.

This summons was taken out by the defendant Boynton for a review of the Master's certificate, and it asked that the certificate might be discharged or varied and that the mesne profits might be assessed only as from May 12, 1922, being the date of the issue of the writ in the action, or, alternately, as from December 25, 1921, being the date up to which rent had been paid, or in the further alternative as from October 28, 1921, being the date of the last breach of covenant.

Substantially the only point argued was whether the mesne profits ought to be assessed from the date fixed by the Master or from the date of the issue of the writ.

W. M. Hunt for the defendant Boynton. Mesne profits can only be assessed from the date of the writ. Mesne profits are damages for trespass and are not therefore assessable so long as the lease continues valid. On the construction of the proviso for re-entry, the landlord's right is to re-enter at any time after there has been a breach of covenant giving rise to a right of re-entry. The lease is only determined upon the landlord doing some unequivocal act, evidencing his intention to enter for the forfeiture and determine the lease: Woodfall's Law of Landlord and Tenant, 20th ed., pp. 380, 387; Cole on Ejectment, p. 408; *Hartshorne* v. *Watson* (1); *Selby* v. *Browne* (2); *Moore* v. *Ullcoats Mining Co.* (3) In the recent case of *Terrell* v. *Chatterton* (4), which was an action for forfeiture for breach of covenant in a lease, the order was drawn up giving mesne profits as from the date of the breach. This was claimed by the landlord, but there was no argument relating to it, the substantial question being whether there was a breach. The order giving mesne profits from the date of the breach is based merely on the concluding words of the judgments of Warrington and Younger L.JJ. to the effect that the plaintiff was entitled to the relief asked for. It is submitted that it is not a binding authority on the point, as it was never in the mind of the Court nor argued before it. In Bullen and Leake's Precedents of Pleading, 7th ed., pp. 885, 886, a specimen of a statement of claim in an action for forfeiture is given. The claim was for forfeiture on a failure to pay rent within twenty-one days. The action is shown as commencing the day after June 24, and rent is claimed down to that date, although the breach must have been in respect of the previous quarter's rent. Mesne profits are only claimed from the date of the writ. This supports the view that mesne profits only run from that date.

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(1) (1838) 4 Bing. N. C. 178.

(2) (1845) 7 Q. B. 620, 632.

(3) [1908] 1 Ch. 575, 587.

(4) [1922] 2 Ch. 647.

Greene K.C. and *Ashworth James* for the plaintiff. It is admitted that a claim for mesne profits is by way of damages for trespass. They can be claimed from the date when the right to re-enter arose. Re-entry has to be claimed by some unequivocal act, but once this has been done the re-entry relates back to the time when the right to re-enter arose; and the lease is avoided therefore as from the date of the breach. This is good sense, for there is no reason why the tenant should retain the profits he has made by his breach. Here the landlord was ignorant of the breach for eighteen months. The right to re-enter arose from the breach and the re-entry relates back to it: *Dunlop* v. *Macedo* (1); *Barnett* v. *Earl of Guildford* (2); *Tharpe* v. *Stallwood* (3); *Anderson* v. *Radcliffe.* (4) Mesne profits used to be the subject of a separate action, but this was altered by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 214.

[Sargant J. It has to be shown that the right to treat the tenant as a trespasser arose the moment the breach of covenant was committed.]

The right to treat the tenant as a trespasser arose at the breach. At any time afterwards the landlord could eject the tenant, and when he does so the entry relates back: see *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.* (1) If not, the landlord would be deprived of both rent and mesne profits as from the date of the breach, for he cannot claim rent after he has become aware of the breach without waiving the forfeiture.

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(1) (1891) 8 Times L. R. 43.

(2) (1855) 11 Ex. 19, 32.

(3) (1843) 5 Man. & G. 760, 774.

(4) (1860) E. B. & E. 806, 824.

[SARGANT J. When once the landlord has by some unequivocal act exercised his right of forfeiture, there is no reason why he should not recover the arrears of rent: see Cole on Ejectment, p. 408.]

He can recover arrears of rent that fell due before the breach of covenant giving rise to the forfeiture, as in *Hartshorne* v. *Watson* (2), but not, it is submitted, rent accruing after the breach. *Terrell* v. *Chatterton* (3) is a decision directly supporting the plaintiff's contention. It is true that the precedent referred to in Bullen and Leake's Precedents of Pleading, 7th ed., pp. 885, 886, contemplates the recovery of rent up to writ and of mesne profits afterwards, but there is no reported case in which this has been done. In *Selby* v. *Browne* (4) Lord Denman regarded it as possible that a re-entry for breach of covenant related back to the breach.

W. M. Hunt in reply. The cases cited on behalf of the plaintiff only show that mesne profits run from the beginning of the trespass. There is nothing to prevent his claiming rent up to the date of the writ and mesne profits afterwards: see Order XVIII., r. 2, and *Pennant's Case.* (5)

SARGANT J. This is a summons to review a certificate by the Master in an action for the recovery of possession of land subject to a lease under a proviso for re-entry.

[His Lordship stated the facts down to the order in the action and continued:] In that state of things the Master made his certificate. It is admitted that the rental value of the property considerably exceeds the rent which the defendant Boynton was paying to the landlord, and the Master in assessing the mesne profits has treated the lease as having been determined, not at the date of the issue of the writ, but at the date when the first subletting took place; that is to say, as having been determined at the date of the first act of the defendant Boynton which gave the plaintiff the right to re-enter. Having treated him as a trespasser as from that date, the Master has ordered him to pay from then in accordance with the real value of the property instead, as this defendant contends is right, of treating his liability as limited to the rent down to the date of the writ and ordering him to pay mesne profits as from that date only.

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(1) [1905] 2 K. B. 493, 499.
(2) 4 Bing. N. C. 178.
(3) [1922] 2 Ch. 647.
(4) 7 Q. B. 620, 633.
(5) (1596) 3 Rep. 64*a*, 65*a*.

The question is whether that decision of the Master is correct. It seems to me that there is a perfectly well settled and established practice recognized in the ordinary text-books and supported by authority. The statement in Woodfall's Law of Landlord and Tenant, 20th ed., p. 387, is this: "Generally speaking, where a forfeiture has been incurred for breach of any covenant or condition, the lessor must do some act evidencing his intention to enter for the forfeiture and determine the lease; and the lease will be avoided from that time only." The words "from that time only" are in italics. The statement appears to be based on the following passage from the well-known book, Cole on Ejectment, p. 408: "The lessor must do some act evidencing his intention to enter for the forfeiture and determine the lease . . . . and the lease will be avoided from that time only." That is supported by a reference to *Hartshorne* v. *Watson* (1) and *Selby* v. *Browne*. (2) I will only quote from the judgment of Patteson J. in the latter of these two cases. He says this: "Then it is alleged, pointedly, that, 'after the accruing of the causes of action' now declared upon, the corporation entered; but it is said that they entered to determine the interest as from a previous time. I do not find that the proviso enabled them to determine as from any time but that of the actual re-entry; and, if it did not, the effect of the plea must be that they did determine from the time of the re-entry; they could not do so, arbitrarily, from an earlier

(1) 4 Bing. N. C. 178.

(2) 7 Q. B. 620, 633.

time." I am not sure whether it was so in that case, but certainly in *Hartshorne* v. *Watson* (1) that effect was given to the proviso in the lease notwithstanding that it contained the additional words "as if the indenture had never been made," words which, of course, were more difficult to get over than the words which occur in this lease. I think that the decision in *Moore* v. *Ullcoats Mining Co.* (2) is to the same effect.

Here it seems to me quite clear not only on the decided cases, but on the terms of the proviso for re-entry itself, that there is a continuing lease unless and until the lessor thinks fit to take advantage of some breach of covenant or some non-payment of rent which entitles him to re-enter. On the ordinary meaning of the language used it seems to me that this proviso is a condition subsequent and a condition which only terminates the lease as from the time of the unequivocal act which marks the exercise by the lessor of his option to take advantage of the breach of covenant by the tenant. If it were otherwise, the law would be in a very precarious condition as between landlord and tenant, as so many leases contain, like the present one, a large number of covenants. I suppose there is not a single lease granted where there is not some breach of covenant in the course of the term; and although large powers are now given to the Court to relieve from forfeiture, that power, of course, does not extend to a breach of the covenant not to underlet.

On the other side a number of cases have been cited where a plaintiff has been held to be entitled to recover damages in respect of a trespass which commenced before the completion of the title of the plaintiff; as for instance, where an administrator has been held to be entitled to recover damages as from a date prior to the date of the grant of administration; or where an heir entering upon copyhold has been held to be entitled to recover damages in respect of a trespass antecedent to the date of his actual entry. It seems to me that those cases really are not in point at all. They are not cases which determine when the period is to commence during which a person is to be treated

(1) 4 Bing. N. C. 178.

(2) [1908] 1 Ch. 575.

as a trespasser. They only decide whether damages can be recovered against an acknowledged trespasser as from a past date by one who completes his own title at a subsequent date. They really have nothing to do with this case.

The plaintiff in the action also relies on *Terrell* v. *Chatterton* (1) as being a direct decision by the Court of Appeal in his favour. That is a recent case where a lessee had covenanted not to assign, underlet, or part with possession of the whole of the premises without the consent of the landlord, but had not covenanted against assigning or underletting a part of them only. He underlet part of the premises with the landlord's consent and then sublet the remainder of the property without his consent. The only point argued was whether that was a breach of the covenant against the assignment or underletting of the whole premises without consent. So far as I can see there is not a trace of any other argument. But reliance is placed upon the order made there with regard to mesne profits. Warrington L.J. in the last two sentences of his judgment said: "There is therefore sufficient justification for the Court to make a declaration. The appeal must be allowed and a declaration made in the terms asked for"; and Younger L.J. said: "I think the plaintiff is entitled to the relief for which he asks." The relief asked for was mesne profits on the footing that the lease had been determined not at the date when the writ was issued but at the date when the subletting without consent was effected. That, of course, would be a binding authority on me, had the question ever been put before the Court and argued. But it is abundantly clear that nothing of the sort happened. There is not a single reference to Woodfall's Law of Landlord and Tenant, or to Cole on Ejectment or to any of the authorities which have been cited to me. In my opinion it cannot be that the form of judgment in the Court of Appeal, upon a point which was never in any way definitely submitted to the judgment of the Court, can have the effect of overriding the perfectly well-settled and established practice.

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(1) [1922] 2 Ch. 647, 652.

Then it was said that it would be quite inconsistent for a landlord to claim rent under the lease after a breach of covenant when he had issued a writ claiming to forfeit the lease by reason of that breach of covenant. In my judgment that is not so. It is quite true that before the issue of the writ the taking of payment of rent after the date when the breach had become known to the landlord would effect a waiver. I do not think, however, that any effect of that kind would be produced when once the plaintiff had unequivocally shown his determination to put an end to the lease by issuing his writ for recovery of possession; and it has been pointed out to me that in the well-known book, Bullen and Leake's Precedents of Pleading, 7th ed., pp. 885, 886, there is a form of statement of claim where a landlord seeking to recover possession from a tenant who has committed a breach of covenant expressly claims in his writ not only rent for the period prior to the breach of covenant relied on but also rent accruing subsequently to that breach. The rent in that particular instance was claimed down to June 24 and the writ was issued on June 25. It is clear that the breach in respect of which the action was brought took place prior to June 24; and also that the date of the writ in the precedent is chosen so as to raise the point.

I think, therefore, that the matter ought to go back to the Master to be reconsidered, unless the parties can agree to the sum that ought to be ascertained on the footing of my judgment. I will declare that, the defendant Boynton admitting his liability to pay rent under the lease to him down to the date of the writ, mesne profits are payable only as from that date.

Solicitors: *Boulton, Sons & Sandeman*; *Williams & James.*

H. C. G.

SLACK *v.* LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED.

[1922. S. 2440.]

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1922
ROMER J.
July 11, 12, 13, 14, 17, 18, 19, 20, 21, 25;
Oct. 19.

C. A.
1923
Feb. 6, 7, 8, 9;
March 26.

Easement—Light—Ancient Lights—Threatened Obstruction—Quia timet Action—Prospective Damage—Injunction or Damages—Injury capable of adequate Compensation in Damages—Jurisdiction of Court—Chancery Amendment Act, 1858 (*Lord Cairns' Act*) (21 *&* 22 *Vict. c.* 27), *s.* 2—*Statute Law Revision and Civil Procedure Act,* 1883 (46 *&* 47 *Vict. c.* 49), *s.* 5 (*b*).

By s. 2 of the Chancery Amendment Act, 1858 (Lord Cairns' Act): " In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against . . . . the commission or continuance of any wrongful act . . . . it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction . . . . and such damages may be assessed in such manner as the Court shall direct " :—

Held, by Lord Sterndale M.R. and Warrington L.J. (Younger L.J. dissenting), affirming the decision of Romer J., that the Court had no jurisdiction under the section to award damages in substitution for an injunction in any action for infringement of ancient lights, where the injury to the plaintiff's lights was only apprehended in the future and no present actionable obstruction existed.

Dicta of Cotton, Bowen and Fry L.JJ. in *Dreyfus* v. *Peruvian Guano Co.* (1889) 43 Ch. D. 316, 332, 333, 342 followed.

MOTION.

This was a motion by the plaintiff, a wholesale and retail baker and confectioner, for (inter alia) an injunction against the defendants in respect of a threatened obstruction to the ancient lights of his business premises, Nos. 2, 3 and 4 Albion Square, Leeds, by new buildings which the defendants were about to erect on the site of Nos. 11, 13 and 15 Albion Street, Leeds. No. 15 had been already pulled down and the erection of the new buildings on that site commenced. Nos. 11 and 13 Albion Street were, but No. 15 was not, immediately opposite to the plaintiff's premises.

The motion was heard with witnesses before Romer J. on July 11, 12, 13, 14, 17, 18, 19, 20, 21 and 25, 1922.

The question turned on the construction of s. 2 of the Chancery Amendment Act, 1858 (Lord Cairns' Act). The Act itself was repealed by the Statute Law Revision and

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Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but by s. 5 (*b*) of that Act "any jurisdiction or principle or rule of equity established or confirmed" by or under the repealed Act was expressly preserved.

On behalf of the plaintiff it was contended at the hearing that in a quia timet action the Court had no jurisdiction to grant damages in lieu of an injunction, and on this point alone the case is reported.

Hughes K.C. and *J. E. Harman* for the plaintiff.
Cunliffe K.C. and *Vernon* for the defendants.

Cur. adv. vult.

1922. Oct. 19. Romer J. [after dealing in a considered judgment with the evidence in detail, continued :] I think, therefore, on the whole, that the new buildings of the defendants will cause a sufficient interference with the comfortable enjoyment of the plaintiff's rooms to entitle him to relief. I ought to state that in arriving at this conclusion I have treated the plaintiff as having a right to the light coming over No. 11 Albion Street as that building now stands. But though I find that the plaintiff has established a cause of action, I am convinced that, if the defendants' buildings had been completed, this would be a case in which, guiding myself by what was said by A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (1) and by Lord Macnaghten in *Colls* v. *Home and Colonial Stores* (2), I should have given damages in lieu of an injunction. To start with, the interference with the plaintiff's legal rights will in my opinion be small and capable of being estimated in money. In the next place, the plaintiff could be adequately compensated by damages. It would be no hardship upon the plaintiff to allow the defendants' buildings to remain, and to pay him a sum of money by way of compensation for any additional expense he might be put to owing to the extended use of electric light or the diminution in the selling

(1) [1895] 1 Ch. 287.

(2) [1904] A. C. 179.

or letting value of his premises. For in my judgment the plaintiff does not, for the purposes of his business, attach any great importance to the question of light. As already stated, his rooms are inadequately lighted now, and yet the plaintiff neglects to adopt obvious means by which the light could be improved if he really attached importance to it. I need only refer to the fact that though his walls are kept quite clean, their reflecting capacity could be considerably improved by whitewashing, and that in the ground-floor windows of No. 4 he still keeps frosted glass in the upper sash, though the necessity for this would seem long since to have disappeared. It is, too, not without significance that when the defendants' old building No. 15 Albion Street was demolished, the plaintiff did not "particularly notice" any difference in the light, though it seems obvious that for the time being it must have been substantially improved, and no evidence was given before me by any employee of the plaintiff that the inadequate lighting of the plaintiff's rooms has interfered in any way with the proper carrying on of the plaintiff's business. This being so, it seems to me that it would be a hardship on the defendants to prevent them using their building site, as proposed, to the best advantage of their business, when no harm will be done to the plaintiff beyond that for which he can be readily and adequately compensated in damages.

It is said, however, that the Court has no jurisdiction to grant damages in lieu of an injunction, where, as in this case, the action is brought in respect of a threatened injury, and no actual wrong has been committed by the defendants. Such jurisdiction, if it exist at all, must owe its existence to the Chancery Amendment Act, 1858, commonly known as Lord Cairns' Act. The Act itself has been repealed, but the jurisdiction which it conferred upon the Court has been preserved: see *Sayers* v. *Collyer*. (1) Now the relevant section of that Act is s. 2, which is in these terms: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of

(1) (1884) 28 Ch. D. 103.

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any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct." Were it not for the words "to the party injured," the matter, I should have thought, was clear enough. In all cases where the Court has jurisdiction to entertain an application for an injunction against the commission of any wrongful act, that is to say, in cases where no wrongful act has been committed but is merely threatened, it may award damages in substitution for an injunction. The words seem plain. It is true that in many such cases it might be very difficult, if not impossible, to assess the damages. That would be a very good reason for not exercising the jurisdiction. It is not a reason for denying its existence. In the present case I do not believe that there would be any difficulty in assessing the damages now, and even if there were, I cannot see why the Court should not make a declaration that the proposed buildings, when erected, would constitute a legal wrong, and give the plaintiff liberty to apply for an inquiry as to damages after the buildings have been completed, when the exact effect of them upon the plaintiff's light will be more accurately ascertained. It is, indeed, to be observed that even in a case where the objectionable building has been completed, there may be just as much difficulty in the immediate ascertainment of damage as in a case where the building is incomplete. For in considering whether a plaintiff has a cause of action or not, the Court must disregard light to which the plaintiff has no legal right: see per Lord Lindley in *Colls' Case* (1); and it may well be that at the time the action comes to be decided, although the defendants' building has been completed, the plaintiff's windows may be receiving light to which he has not acquired a right, and that he is not at the moment suffering any actual damage. But it has never been suggested, so far as I know, that for this reason the Court has, in such a case, no option but to grant a mandatory injunction for the removal of the offending building.

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(1) [1904] A. C. 179, 211.

I must now consider whether, having regard to the words "to the party injured," I ought to place a construction upon the section of the Act different from that which I should have placed upon it in the absence of those words. It is said that those words show that the Court has only jurisdiction to award damages where damages have arisen or where a legal injury has already been sustained. I should not myself have arrived at this conclusion. The Act is dealing with persons who are applying for equitable relief, and I should have thought that the more natural construction of the words "party injured" was "the party entitled to the equitable cause of action," or "the party who, if equitable relief be refused, will sustain a legal injury by the breach of the covenant, contract or agreement or the commission or continuance of the wrongful act." Where damages are awarded in lieu of an injunction, the damages must always be granted in respect of an injury which has not been suffered at the time the order is made. To take the case of a continuing nuisance, damages could be recovered in respect of the wrong already suffered and would now be assessed down to the date of the assessment: see Order xxxvi., r. 58. An injunction would operate as to the future, and if damages be awarded in lieu of that injunction (as may admittedly be done: see *Shelfer* v. *City of London Electric Lighting Co.* (1)) such damages would necessarily be in respect of an injury not yet suffered. If then the words "the party injured" mean, as has been suggested, the party who has suffered a legal injury or has incurred damages recoverable at common law, they mean a party who has suffered a legal injury or has incurred such damages by reason of a wrongful act, other than that which the injunction if granted would have been designed to prevent—I cannot for myself think that was the intention of the Legislature. I cannot conceive any

(1) [1895] 1 Ch. 287, 297.

reason why the Court should have been given jurisdiction to award damages in respect of a future legal injury where a legal injury already exists, and should not have a like jurisdiction in a case where there is no such present legal injury. To take a concrete case—I cannot understand why where a breach of contract has already been committed the Court can in addition to giving damages for that breach give damages in respect of the breaches to be committed in the future, but should not be able to award damages for breaches in the future merely because no such breach has been presently committed. If therefore the question were free from authority, I should in this case have granted damages in lieu of an injunction. The question has, however, been considered or referred to in several reported cases. In *Holland* v. *Worley* (1) it is true that Pearson J. granted damages in lieu of an injunction where the objectionable building had not been completed. But in *Dreyfus* v. *Peruvian Guano Co.* (2), a case before the Court of Appeal, every member of the Court (which consisted of Cotton, Bowen and Fry L.JJ.) expressed an opinion that the Court had no jurisdiction to award damages where no legal wrong had been done (per Cotton and Fry L.JJ. (3)) or where no damages had arisen in the ordinary sense of the term as known to lawyers: per Bowen L.J. (4) Bowen L.J. further stated that he was informed that the view he took of the subject was the view taken by Sir George Jessel. In the view that Cotton and Fry L.JJ. took of the facts in that case, the point did not arise for actual decision. In the view that Bowen L.J. took of the facts it did arise, or at all events was treated by him as having necessarily to be decided in order to arrive at the conclusion that he did. In *Martin* v. *Price* (5) Lindley L.J., delivering the judgment of a Court consisting of himself and A. L. Smith and Davey L.JJ., stated that the question was by no means free from difficulty. The Court did not, however, find it necessary to decide

(1) (1884) 26 Ch. D. 578.
(2) 43 Ch. D. 316.
(3) 43 Ch. D. 342.
(4) Ibid. 333.
(5) [1894] 1 Ch. 276.

it. In *Shelfer* v. *City of London Electric Lighting Co.* (1) A. L. Smith L.J., while refusing to accede to the argument that Lord Cairns' Act only gave jurisdiction to award damages in lieu of a mandatory injunction and did not give jurisdiction to award damages if the object of the injunction be to prevent a continuing nuisance, referred to the case of *Dreyfus* v. *Peruvian Guano Co.* (2) as a binding authority for the proposition that for an injury not yet committed, but only threatened, the Court of Chancery has no power to award damages. In *Cowper* v. *Laidler* (3) Buckley J. was prepared, if it had been necessary, to deal with the case upon the footing that the expression of opinion in the Court of Appeal in the *Dreyfus Case* (2) ought, so far as he was concerned, to be treated as concluding the matter. Finally, in *Litchfield-Speer* v. *Queen Anne's Gate Syndicate* (*No.* 2) (4) P. O. Lawrence J. referred to the above cases as showing that it is extremely doubtful whether the Court has power in a quia timet action to give damages in lieu of granting an injunction. In these circumstances, it would not, I think, be proper for me to deal with the question as though it were still open for decision in a Court of first instance. I think that I am bound to deal with the case upon the footing (to use the words of Buckley J. already cited) that the expression of opinion in the Court of Appeal in the *Dreyfus Case* (2) ought, so far as I am concerned, to be treated as concluding the matter. The injunction ought therefore to go.

R. M.

C. A.

The defendants appealed. The appeal was heard on February 6, 7, 8, 9, 1923.

Cunliffe K.C. and *Vernon* for the appellants.
Hughes K.C. and *J. E. Harman* for the respondent.

Cur. adv. vult.

The arguments sufficiently appear from the judgments.

[The following authorities were referred to: *Crowder* v.

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(1) [1895] 1 Ch. 287.
(2) 43 Ch. D. 316.
(3) [1903] 2 Ch. 337.
(4) [1919] 1 Ch. 407.

Tinkler (1); *Fletcher* v. *Bealey* (2); *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3); *Litchfield-Speer* v. *Queen Anne's Gate Syndicate (No. 2)* (4); *Emperor of Austria* v. *Day and Kossuth* (5); *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (6); *Holland* v. *Worley* (7); *Aynsley* v. *Glover* (8); *Dreyfus* v. *Peruvian Guano Co.* (9); *Chapman, Morsons & Co.* v. *Guardians of Auckland Union* (10); *Fritz* v. *Hobson* (11); *Cowper* v. *Laidler* (12); *Shelfer* v. *City of London Electric Lighting Co.* (13); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (14); *Colls* v. *Home and Colonial Stores* (15); *Sayers* v. *Collyer* (16); *Martin* v. *Price* (17); *Davenport* v. *Rylands* (18); *Senior* v. *Pawson* (19); *Curriers' Co.* v. *Corbett* (20); *Allen* v. *Ayres* (21); *Greenwood* v. *Hornsey* (22); *Anderson* v. *Francis* (23); *City of London Brewery Co.* v. *Tennant* (24); *Isenberg* v. *East India House Estate Co.* (25); *Dicker* v. *Popham, Radford & Co.* (26); Goddard on Easements, 7th ed., p. 469.]

March 26. The following written judgments were delivered:—

LORD STERNDALE M.R. This is an appeal from a judgment of Romer J. given in an action brought by the plaintiff to restrain the defendants from obstructing his right to light by erecting their buildings on an adjoining site so as to do so. No part of the buildings has been erected, but the position and dimensions of them as at present intended were shown upon a model and plan produced at the trial. The learned judge came to the conclusion on the evidence that the plaintiff had established a probability of interference with the light coming to the windows of his house sufficient to give him a cause of action and he granted an injunction. He however said that he would not have done so, but would have awarded damages in substitution if he had felt himself free to hold that Lord Cairns' Act empowered him to do so, and expressed his opinion in these words: "But though I find that the plaintiff has established a cause of action, I am convinced that, if the defendants' buildings had been completed, this would be a case in which, guiding myself by what was said by A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (1) and by Lord Macnaghten in *Colls* v. *Home and Colonial Stores* (2), I should have given damages in lieu of an injunction. To start with, the interference with the plaintiff's legal rights will in my opinion be small and capable of being estimated in money. In the next place, the plaintiff could be adequately compensated by damages." I do not think I need read the rest of the passage.

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(1) (1816) 19 Ves. 617, 622.
(2) (1885) 28 Ch. D. 688.
(3) (1885) 15 Q. B. D. 476, 485, 486.
(4) [1919] 1 Ch. 407.
(5) (1861) 3 D. F. & J. 217, 240.
(6) (1877) 6 Ch. D. 757.
(7) 26 Ch. D. 578, 583.
(8) (1874) L. R. 18 Eq. 544; (1875) L. R. 10 Ch. 283, 287.
(9) 43 Ch. D. 316; [1892] A. C. 166.
(10) (1889) 23 Q. B. D. 294, 297.
(11) (1880) 14 Ch. D. 542, 556.
(12) [1903] 2 Ch. 337, 339.
(13) [1895] 1 Ch. 287, 310, 314, 322.
(14) [1899] 2 Ch. 217, 237.
(15) [1904] A. C. 179, 192, 212.
(16) 28 Ch. D. 103.
(17) [1894] 1 Ch. 276.
(18) (1865) L. R. 1 Eq. 302.
(19) (1866) L. R. 3 Eq. 330.
(20) (1865) 2 Dr. & Sm. 355.
(21) [1884] W. N. 242.
(22) (1886) 33 Ch. D. 471.
(23) [1906] W. N. 160.
(24) (1873) L. R. 9 Ch. 212.
(25) (1863) 3 D. J. & S. 263.
(26) (1890) 63 L. T. 379, 381.

He however considered that he was prevented from so doing by the expressions of opinion by Cotton, Bowen and Fry L.JJ. in the case of *Dreyfus* v. *Peruvian Guano Co.* (3) Again I quote his own words: "I think that I am bound to deal with the case upon the footing (to use the words of Buckley J. already cited) that the expression of opinion in the Court of Appeal in the *Dreyfus Case* (3) ought, so far as I am concerned, to be treated as concluding the matter."

For the purposes of the appeal at the present stage the findings of Romer J. on the main part of the case are not challenged, and the only question is whether there is jurisdiction under Lord Cairns' Act (21 & 22 Vict. c. 27) to award damages in substitution for an injunction in a case where the injury to light is only apprehended in the future, and no actual present obstruction exists. The appellants argue that such a jurisdiction is given by that Act, while the

(1) [1895] 1 Ch. 287.
(2) [1904] A. C. 179.
(3) 43 Ch. D. 316.

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respondent on the other hand contends that although it empowered the Court of Chancery to give damages instead of an injunction where a Court of law could have given damages it confers no power to give such damages in a case where no actual obstruction exists.

The question is one of importance. The injunction is not against erecting a building such as is shown on the plans and models used at the trial, but any building obstructing the plaintiff's light. There is nothing to compel the defendants or to ensure that they shall in the end erect their building according to the plans and models. The plans and models are of use to show that the defendants are proposing to do something which will infringe the plaintiff's rights, but a person may, and often does, vary his plans in the course of building, making the obstruction either less or more, and to assess damages on the basis of their original plans and models may be to assess them at a figure quite different from that of the damage which is suffered by the erection of the actual buildings. This however, though it affects the practical importance of the matter, has no bearing upon the question of jurisdiction unless perhaps it may afford some reason why that jurisdiction was not conferred, if in fact it was not. The difficulty may also perhaps be avoided by delaying the inquiry as to damages till the building is completed.

It is well first to consider the Act apart from any authority, and then to inquire whether there is any authority by which we are bound or which we ought to follow as to its construction. The section relevant to this question is s. 2, and is as follows : [His Lordship read the section and continued :] The words are certainly very wide, and at first sight seem to deal with a breach of contract either past or future, and all torts whether committed or to be committed. I have already pointed out that cases where damages could be given for future breaches of contract are so few as to be negligible, and very likely the matter was never considered with regard to them, and I do not think it is necessary to say anything more about cases of contract. With regard to torts, the words of the section are more in favour of the appellants' contention, for they speak of an injunction against the commission or continuance of any wrongful act, and considering that an action quia timet must have been a thing well known to the framers of the Act the use of both the words "commission" and "continuance" points to the inclusion in the powers given by the section of both future and existing wrongful acts. It must be remembered also that the section deals with all wrongful acts; and although for the reasons I have already given the assessment of damages in the case of a threatened obstruction of light by a building not yet erected is extremely difficult, it is quite possible that in the case of future wrongful acts of another kind the difficulty may not be so great. Besides the difficulty may possibly be avoided by the means suggested by Romer J.—i.e., by making a declaration that the buildings as proposed would be a legal wrong, and giving the plaintiff liberty to apply for an inquiry as to damages after the buildings have been completed. There seem therefore to be strong arguments in favour of the appellants' contention that the jurisdiction exists.

The respondent however relies upon the fact first that this is an Act dealing avowedly with procedure, and upon the words "the party injured" as designating the person in whose favour the damages are to be assessed. Certainly "the party injured" is an expression more suited to a person who has already been injured than to a person who has only been threatened, and if weight is to be attached to the title of the Act, "An Act to amend the course of procedure in the High Court of Chancery," the expression is in favour of the respondent's contention, for to give a right of action for damages to a person who has in fact suffered no injury but has merely been threatened with one is to give a new right of action and not merely to amend procedure.

I should like here to notice an argument of the appellants with which I cannot agree. It has been decided in *Fritz* v. *Hobson* (1) that the damages which can be given in substitution for an injunction include damages suffered after the writ,

(1) 14 Ch. D. 542, 557.

whereas at common law damages could only be assessed up to the date of the writ, and for any future damages another action must be brought. From this it was argued that Lord Cairns' Act did give a right to damages which did not exist before, and that it might be inferred from its giving a right to future damages that it gave a right to damages for a future breach. I think this is a fallacy. The restriction of the assessment of damages to the date of the writ was a matter of procedure, and the right to the damages after the writ existed, although another proceeding was necessary to recover them. I think this view is corroborated by the fact that in the case of a continuing breach the necessity for a second proceeding was obviated by one of the rules of practice and procedure, Order XXXVI., r. 58. I only mention this to show that I have not overlooked it, and, as I shall show later, I think Fry L.J. took the view which I have expressed. On the whole I think that apart from authority I should be of opinion that the wide words of the section do give the jurisdiction, leaving it to the discretion of the judge not to exercise it where the difficulties of assessment which I have mentioned exist.

The matter is not, however, without authority, and in my opinion weighty authority. I do not mean that there is a decision on the point which binds us—if there were the matter would be easy—but there are dicta of a Court consisting of Cotton, Bowen and Fry L.JJ. in the case already mentioned of *Dreyfus* v. *Peruvian Guano Co.* (1), which in my opinion clearly show that in the opinion of those learned judges the jurisdiction does not exist. But for the argument of the appellants' counsel in this case I should have thought that there could be no doubt of the meaning of the words used in that case. I will read them. Bowen L.J. said (2): "Sir Horace Davey, in the first place protesting that he was not bound to argue the facts of the case, assumed for the purpose of his argument that there had been no tortious act in law at all; nevertheless, he said, there was nothing wrong in giving damages because Lord Cairns' Act clothed the

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(1) 43 Ch. D. 316.

(2) 43 Ch. D. 332, 333.

Court of Chancery with the jurisdiction, where no wrong had been done in law at all, nevertheless, on a threat of injury which would give rise to the jurisdiction for injunction, to give damages in substitution for such injunction. I speak with perfect consciousness that I am only a proselyte at the gate in matters of equity, and what I have learned about it has been learned from wiser people than myself who sit with me, but I am still giving my opinion as I am entitled and bound to do. I am of opinion that the 2nd section of 20 & 21 Vict. c. 27, commonly called Lord Cairns' Act, did not clothe the Court of Chancery with such a jurisdiction. It is true the section applies in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction, but the only weapon with which the Court is armed by virtue of the section is to award damages to a party injured, which must, I think, mean damages where damages have arisen, and in a case where no damages have arisen in the ordinary sense of the term as known to lawyers, I am of opinion the Court has no power to give damages. I should be alarmed if that were my opinion only, but I believe I am justified in saying that my learned Brother, Lord Justice Cotton, agrees with me in that, and I will leave my other learned Brother to say whether he differs from me or not. But this I may say, as it was asserted by Sir Horace Davey—at least Sir Horace Davey seemed to put it forward as a proposition—that the practice in the Courts of Chancery had been in favour of his view, I have consulted others who are familiar with the practice among my colleagues, and I am told they are not aware of any such practice. I am specially informed by one who certainly can speak with authority on the point, that the view which I am now taking of this subject is the view taken by the late Master of the Rolls."

Fry L.J., who was the Lord Justice as to whose concurrence Bowen L.J. was not quite clear, said this (1): "I have only one other observation to add. I entirely agree with what has been said by Lord Justice Bowen on the subject of Lord

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(1) 43 Ch. D. 316, 342.

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Cairns' Act. I am clear that the statute often enables the Court, where a wrong has been done, to give damages upon a different scale from what was done by the Courts of Common Law, because it may give them in substitution for an injunction"—he was there referring to his own decision in *Fritz* v. *Hobson* (1)—" but where there has been no wrong done it appears to me that Lord Cairns' Act confers no power to give damages."

And Cotton L.J. said (2): " I agree with what has been said by Lord Justice Fry as regards Lord Cairns' Act. I did not advert to it because I did not think it a matter which arose, taking my view of the case before us."

I should have thought that nothing could have been clearer than that those words, right or wrong, were a distinct statement that in the opinion of those judges the Act did not confer upon the Court the jurisdiction claimed. Such has been the meaning always put upon them whenever they have been cited, as they have in several cases during the last thirty years.

The argument for the appellants, however, seemed to me to be that the circumstances of the case of *Dreyfus* v. *Peruvian Guano Co.* (3) were so peculiar that the words must be considered in connection with them, and that when so considered it would appear that the learned judges did not mean what they said and what they have for thirty years been always considered to mean. I might content myself with saying that I agree with all the other Courts which have interpreted these dicta, but in deference to the argument I think I ought to undertake the not very pleasant task of examining the facts of the case cited to show that the opinion of the learned judges was given upon an argument based upon this very contention. That opinion was not necessary upon the view of the facts taken by Cotton and Fry L.JJ.; it was necessary upon the view taken by Bowen L.J., who was the dissentient judge. I will state the facts of the case as shortly as I can. They are all set out most clearly and

(1) 14 Ch. D. 542.

(2) 43 Ch. D. 316, 342.

(3) 43 Ch. D. 316.

fully by Lord Macnaghten in [1892] A. C. 166 at p. 189, but I hope to be able to omit a good many of them.

The Peruvian Government had been consigning cargoes of guano to the company on certain terms, but in consequence of the company's refusing to continue to make the advances stipulated, sent the bills of lading which they had to the plaintiffs that they might deal with the cargoes. These however had been loaded on vessels chartered by the defendants, who were thus able to keep control of them and claimed to be entitled to do so. Some of the cargoes had arrived and some were still at sea, but the defendants had control of them all, and exercised it in a way which the House of Lords held to constitute a wrongful detention of the cargoes from the plaintiffs. The plaintiffs then issued a writ against the defendants and the captains of the vessels, and moved for an injunction. When the motion came on for hearing an order was made by consent that the defendants should handle the cargoes on arrival and account for the proceeds. The captains were dismissed from the action. This order was expressed to be without prejudice to the rights of the parties in the action. Some months after an order was made for a receiver. The action came on for trial before Bacon V.-C., and he found that the possession of the defendants was wrongful, ordered them to account for the proceeds without deduction of the expenses of realization, and directed an inquiry as to damage for the detention by the defendants' wrongful possession. This was affirmed by the Court of Appeal. The defendants appealed to the House of Lords, who varied the order by allowing the defendants their expenses, but did not interfere with the direction for an inquiry as to damages. The chief clerk then held the inquiry and awarded a substantial sum, assessing the damages on the basis of the interest lost to the plaintiffs on the proceeds from the time of realization. He might have taken an earlier date, as the House of Lords eventually held the possession of the defendants to have been wrongful from its inception: see Lord Watson (1), and the plaintiffs might but for it have sold the cargoes afloat: see Lord Field. (1) The defendants moved before Kay J. to vary the certificate on the ground that the decision of the House of Lords by implication decided that their possession had not been wrongful, and the motion was dismissed. The defendants then appealed to the Court of Appeal, consisting of Cotton, Bowen and Fry L.JJ., and supported the appeal by the same arguments. Cotton and Fry L.JJ. took the same view as Kay J.—namely, that the decision of Bacon V.-C. that the possession was wrongful and the direction for an inquiry as to damages still stood notwithstanding the decision of the House of Lords. Up to this point the question before us in this case did not arise. Bowen L.J. took a different view from the other members of the Court, and was of opinion that in the circumstances the defendants' possession could not be held to be wrongful, and Sir Horace Davey for the plaintiffs then advanced an argument that did raise the contention directly. He contended that assuming there had been no wrongful possession by the defendants, and therefore no wrongful act committed, still the defendants had threatened a wrongful possession and had thereby caused loss to the plaintiffs, and as the wrongful possession threatened could have been restrained by injunction the plaintiffs under Lord Cairns' Act were entitled to damages in substitution for it. This seems to me to raise the exact point. The learned counsel for the appellants suggested that it did not, because Sir Horace Davey had argued that such damages could be given although none had been suffered in fact, but this always seemed to me an impossible contention and it is clearly not correct: see Sir Horace Davey's argument (2) coupled with his statement (3) that the fact of loss was not disputed, and Bowen L.J.'s account of it (4), and see also the report of the case in the House of Lords. (5) This argument was unnecessary on the view of the facts taken by Cotton and Fry L.JJ., but necessary and relevant on that taken by Bowen L.J. That

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(1) [1892] A. C. 166, 185.

(1) [1892] A. C. 197.
(2) 43 Ch. D. 316, 324.
(3) 43 Ch. D. 323.
(4) Ibid. 316, 333.
(5) [1892] A. C. 166, 182.

learned judge gave two answers to it, one that no such damages could be given, because Lord Cairns' Act gave the Court no jurisdiction to give them where no actual wrongful act had been committed. This is the only answer relevant to this case, but Bowen L.J. also gave another—namely, that the plaintiffs had suffered no damage in fact, because they had only been kept out of their money by their own consent in agreeing to the order I have mentioned. This view was negatived by the House of Lords. It is possible that Bowen L.J. might have given another answer—namely, that at the time damages were asked for the threat of a wrongful act could not be carried out and therefore no injunction could be granted, and that damages could only be awarded where the plaintiffs had established a case for an injunction. I do not say whether this would have been a good answer or not, the relevant fact is that the learned judge did not give it, and if it be the fact that he could have given it that does not detract from the value of the reasoning by which he supported the answer that he did give. The House of Lords affirmed the decision of the majority of the Court of Appeal with a variation as to the length of time during which the damages were suffered, but this decision of the House of Lords (1) to which I have referred has no bearing on the matter except that it states the facts more fully than I have stated them. Although the House of Lords did not find it necessary to give any opinion on the point by reason of the view that they took that there had been a wrongful detention, it was clearly raised by Sir Horace Davey (2) in the passage I have already read. In my opinion it cannot be argued that the opinions of the Lords Justices were given upon anything except the point now under consideration, and I should not have thought the contrary was arguable if it had not been argued. These dicta came under consideration in the case of *Martin* v. *Price* (3) before a Court of Appeal of which Davey L.J. was a member. No one could know better than he what was the true meaning of what was said in *Dreyfus* v.

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(1) [1892] A. C. 166.
(2) [1892] A. C. 182.
(3) [1894] 1 Ch. 276.

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Peruvian Guano Co. (1), for he was the counsel who argued the case, and in the judgment of the Court delivered by Lindley L.J. this statement, to which he was an assenting party, was made (2): "The question whether the Court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, is by no means free from difficulty. On the one hand this Court, in *Dreyfus* v. *Peruvian Guano Co.* (3), expressed a clear opinion against the existence of such jurisdiction. On the other hand, it has been very commonly assumed, and there are several observations by eminent judges favouring the view, that there is such a jurisdiction; and in *Holland* v. *Worley* (4) the late Mr. Justice Pearson did award damages in lieu of an injunction which, if granted, would have been simply preventive, and in no sense mandatory. The question is one of very great importance; but we do not think it right to keep the parties waiting while we make up our minds upon it." And then the learned Lord Justice went on to say that if there was such a jurisdiction in that case it was not a proper one in which to exercise it.

I agree that the effect of this is to leave it open to the Court of Appeal to reconsider the matter and differ, if they see fit, from the previous dicta, but it leaves no doubt as to their meaning, and the question which those dicta conclude if they are upheld is stated quite plainly in the judgment. It seems to me quite irrelevant to consider what were the particular facts of that case; the question left open is stated with absolute clearness in a considered judgment. Lindley L.J. refers to the decision of Pearson J. in *Holland* v. *Worley* (4), where that learned judge exercised the jurisdiction, as he also did in *Allen* v. *Ayres*. (5) In neither of those cases, however, was the question of jurisdiction raised. He also mentions other cases where remarks assuming it had been were made by other judges. I do not know to what cases he refers except probably to *Aynsley* v. *Glover* (1) before Jessel M.R., and I do not know to what the words "there are several observations by eminent judges favouring the view" refer.

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(1) 43 Ch. D. 316.
(2) [1894] 1 Ch. 276, 284.
(3) 43 Ch. D. 316, 333, 342.
(4) 26 Ch. D. 578.
(5) [1884] W. N. 242.

The next occasion on which reference was made to these dicta in the Court of Appeal was in *Shelfer* v. *City of London Electric Lighting Co.* (2), and in that case A. L. Smith L.J., who had been a party to the decision in *Martin* v. *Price* (3), and therefore had had the matter under discussion, referred to them in these words (4): "That section"—that is s. 2 of Lord Cairns' Act—"is in the widest possible terms, and I can find no limitation as to its applying only where the injunction sought is mandatory as distinguished from an injunction to prevent a continuing nuisance; and as regards jurisdiction, construing the section according to its plain English, I cannot doubt that the Court of Chancery has the power in the one case as in the other to award damages in substitution for an injunction." This is a case of a mandatory injunction; a preventive injunction does not concern this case. Then he continued: "The only binding authority which has placed a restricted construction upon the section is *Dreyfus* v. *Peruvian Guano Co.* (5), in which it was held in this Court that for an injury, not yet committed but only threatened, the Court of Chancery has no power to award damages."

I think the learned Lord Justice put the matter too high in calling the dicta in that case a binding authority, but his words at any rate show that he had no doubt as to their effect. The same view was taken by Lord Wrenbury (then Buckley J.) in *Cowper* v. *Laidler* (6) and by Romer J. in the present case. It should be noticed that so far as I can find, although the question of the correctness of the dicta is left open in a Court of Appeal, no disapproval or adverse criticism of them appears in any of the cases in which attention has been drawn to them. It seems to me idle

(1) L. R. 18 Eq. 544.
(2) [1895] 1 Ch. 287.
(3) [1894] 1 Ch. 276.
(4) [1895] 1 Ch. 287, 319.
(5) 43 Ch. D. 316.
(6) [1903] 2 Ch. 337.

in the face of these circumstances to contend that the expressions of opinion in *Dreyfus* v. *Peruvian Guano Co.* (1) are not weighty dicta in opposition to the appellants' argument.

It was also argued that the words could not mean what every one has taken them to mean, because if so read they are inconsistent with previous cases and in particular with the judgment in *Chapman, Morsons & Co.* v. *Guardians of Auckland Union* (2), to which Bowen L.J. was a party. They are and I think were intended to be inconsistent with the cases in which the jurisdiction had been assumed, though without argument on the point, but I do not think they are inconsistent with the arguments in the case I have mentioned. The direct question in that case was whether notice of action was necessary, and it was held that it was not because the action was really an old Chancery action for an injunction, and that the statute requiring notice did not apply to such an action. It was an action for nuisance through pollution by sewage, and damages were given instead of an injunction. No nuisance had arisen before the issue of the writ, although the sewage had been sent into the river before, but it had arisen before the judgment, and damages in lieu of an injunction were given for the nuisance. It may be that no cause of action for damages existed at the time of the issue of the writ, and if so the case extends the decision in *Fritz* v. *Hobson* (3) to the extent that it allows in such a case damages accruing after the writ to be given in respect of a cause of action also accruing after the issue. I am not sure that this was present to the mind of the Court, but if it be so it certainly does not involve the conclusion that damages may be given in respect of a cause of action which is not in existence at the time of the writ or of the judgment. I do not think Bowen L.J. can have thought there was any inconsistency, for the case was cited to him in the argument of Sir Horace Davey which I have mentioned. At any rate if there be such inconsistency it does not seem to me to establish that Cotton, Bowen and Fry L.JJ. were so incapable of expressing their meaning or so careless in expressing it that they used words which have been misunderstood by all the judges before whom they have come for thirty years.

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(1) 43 Ch. D. 316.

(2) 23 Q. B. D. 294.

(3) 14 Ch. D. 542.

As I have already explained they are only dicta, and do not constitute a decision binding upon us. In the view that Cotton and Fry L.JJ. took of the facts they were unnecessary, as stated by Cotton L.J.; they were relevant to the view taken by Bowen L.J., but that was a dissenting view. *Martin* v. *Price* (1) in my opinion states that they are open to review in a Court of Appeal, and the question is whether we ought to disregard them. Dicta are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case, and is not really present to the judge's mind. Such dicta, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. Some dicta however are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court. It is open no doubt to other judges to give decisions contrary to such dicta, but much greater weight attaches to them than to the former class. The dicta in *Dreyfus* v. *Peruvian Guano Co.* (2) are of the latter class. As I have shown the point was clearly brought before the Court and argued, and necessarily so, upon the view taken by Bowen L.J. There was ample opportunity for consideration of it, for though the judgment was not a reserved judgment the case had lasted over several days, being heard, according to the report, on November 21, 22, 23, 24, and December 2 and 3, and therefore there was ample time for consideration. Moreover it is quite plain from the judgment of Bowen L.J. that he had in fact given very careful consideration to the matter, and it is clear from his words that he had consulted

(1) [1894] 1 Ch. 276.

(2) 43 Ch. D. 316.

Cotton L.J. and made other inquiries. Whether he had actually consulted Fry L.J. does not appear so clearly, but I should think there is little doubt that he had, and at any rate both the other Lords Justices expressed their entire agreement with him. It is to be noted that Fry L.J. in *Fritz* v. *Hobson* (1) held that damages in substitution for an injunction were not confined to damages up to the date of the writ, but obviously from what he said in *Dreyfus* v. *Peruvian Guano Co.* (2) he did not consider that from that fact it was to be inferred that Lord Cairns' Act gave any new right to damages. It is hardly possible to imagine dicta which are not binding decisions of greater weight, and as I have already pointed out, though they have been referred to on several occasions they have never elicited any expression of disapproval. The cases of *Holland* v. *Worley* (3) and *Allen* v. *Ayres* (4) before Pearson J., and that of *Aynsley* v. *Glover* (5) before Jessel M.R., upon which most reliance was placed by the plaintiff, were before *Dreyfus* v. *Peruvian Guano Co.* (2), and in none of them was the question raised or brought to the notice of the Court. I think the decision in *Martin* v. *Price* (6) shows that it is open to us to decide the question contrary to those dicta, and the question is whether we ought to do so. I am of opinion that we ought not, and that if opinions of such weight given after such careful consideration more than thirty years ago, often mentioned and considered during that time and never disapproved, are to be overruled, it should only be done by the final tribunal of appeal and not by a Court of co-ordinate jurisdiction.

I think, therefore, the appeal should be dismissed with costs.

WARRINGTON L.J. The action in which this appeal arises is one for an injunction restraining the defendants from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows.

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(1) 14 Ch. D. 542.
(2) 43 Ch. D. 316.
(3) 26 Ch. D. 578.
(4) [1884] W. N. 242.
(5) L. R. 18 Eq. 544.
(6) [1894] 1 Ch. 276.

At the date of the issue of the writ and of the trial the buildings of the defendants had not been actually erected to such a height as to cause a nuisance or illegal obstruction, and therefore no legal wrong had at either of those dates been committed, but the learned judge Romer J. found that the defendants were intending to erect buildings according to a certain plan and model, and that buildings so erected would cause a nuisance or illegal obstruction to the plaintiff's ancient lights sufficient to give him a cause of action and prima facie to entitle him to an injunction. But he found certain other facts, being those stated by A. L. Smith L.J. in his judgment in *Shelfer* v. *City of London Electric Lighting Co.* (1), as justifying as a general rule the awarding of damages in substitution for an injunction, and said that if the buildings had been completed he would have given damages in lieu of an injunction. He however found himself compelled to hold in deference to the opinions expressed by three judges of the Court of Appeal in *Dreyfus* v. *Peruvian Guano Co.* (2), but contrary to his own opinion, that inasmuch as no wrong had actually been committed he had no jurisdiction to award damages. He accordingly granted an injunction in the terms claimed on the writ. From this the defendants appeal.

Now it is obvious that two separate questions arise: first, whether there is jurisdiction to substitute damages for an injunction; and secondly—the exercise of the jurisdiction if it exists being clearly discretionary—whether in the particular case it should be exercised. It is with the first question alone that we are at present concerned. It must be remembered also that the case is not one in which a wrong having been committed the question is whether damages may be assessed at such a sum as will cover the future effects of such wrong on the repetition or continuance of wrongful acts already committed.

The jurisdiction if it exists was conferred by the statute 21 & 22 Vict. c. 27, usually known as Lord Cairns' Act, and the question turns on the true construction of s. 2. It is true the Act has been repealed by the Statute Law Revision (Civil Procedure) Act, 1883, but by the same Act all existing jurisdictions are preserved, and one has therefore still to turn to the repealed Act to see if there is the jurisdiction in question. From the preamble it appears that it was thought expedient to amend further the practice and course of proceeding of the High Court of Chancery and other Chancery Courts mentioned. I refer to this because some reliance was placed upon it by counsel for the plaintiff, but to my mind it throws no light on the construction of s. 2. That section is in these terms: [His Lordship read the section and continued:] It will be seen that the injunctions in substitution for which damages may be granted include injunctions against the commission of wrongful acts as contrasted with those against the continuance of such acts. In regard to suits for an injunction restraining interference with light in particular it is notorious that the majority of such suits were begun and brought to trial before the erection of the buildings complained of owing to the reluctance of the Court to grant a mandatory injunction requiring the demolition of buildings erected perhaps at great expense, and it is difficult to suppose that it was intended to exclude such suits from the operation of a provision which was intended to remedy a defect in the procedure of the Court. If there were nothing more in the section, I confess I should think it reasonably clear that damages might be awarded in substitution for an injunction in cases in which a wrongful act is threatened and intended though not actually committed. But it is said that this construction is inconsistent with the use of the technical legal term "damages" and the reference to "the party injured" as the person to whom they are to be awarded. I am not much impressed by this argument. If, as I think it is clearly shown, the intention is to give power to substitute "damages" for an injunction in cases where ex hypothesi no injury has been suffered for which damages in the strict legal sense could be awarded, a construction ought if possible to be given to the expressions now in question such as would not defeat that intention. I see no real difficulty, seeing that the Act is dealing with the Court of Chancery which had no jurisdiction to give damages in the strict legal sense, in holding that "damages" may be read here as compensation in money for that which but for the Act would be restrained by injunction, and "the party injured" as the party who in that Court would be entitled to relief on establishing a threat and intent to inflict injury upon him if not restrained. In the absence of authority binding me to decide otherwise I should conclude that the jurisdiction exists in such a case as the present.

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(1) [1895] 1 Ch. 287, 322.

(2) 43 Ch. D. 316.

But is this Court at liberty to give effect to such a view of the construction and effect of the Act?

In *Dreyfus* v. *Peruvian Guano Co.* (1) three Lords Justices—namely, Cotton, Bowen and Fry L.JJ.—expressed the opinion that the Act conferred no jurisdiction to award damages in a case where no wrong had actually been done. Bowen L.J.—after mentioning that the argument of Sir Horace Davey had been that Lord Cairns' Act clothed the Court of Chancery with the jurisdiction, where no wrong had been done in law at all, nevertheless, on a threat of injury which would give rise to the jurisdiction for injunction, to give damages in substitution for such injunction—expressed his conclusion in these words (2): "In a case where no damages have arisen in the ordinary sense of the term as known to lawyers, I am of opinion the Court has no power to give damages." That there is no mistake as to the point Bowen L.J. was dealing with is shown by an interlocutory question addressed to Sir Horace Davey in these terms (3): "Do you assert that under Lord Cairns' Act damages could be given in a case where actual legal wrong had not been committed but only threatened?" Fry L.J. said (4): "I entirely agree with what has been said by Lord Justice Bowen on the subject of Lord Cairns' Act. I am clear that the statute often enables the Court, where a wrong has been done, to give damages upon a different scale from what was done by Courts of Common Law, because it may give them in substitution for an injunction;

(1) 43 Ch. D. 316.
(2) Ibid. 333.
(3) 43 Ch. D. 324.
(4) Ibid. 342.

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but where there has been no wrong done it appears to me that Lord Cairns' Act confers no power to give damages." Cotton L.J. expressed his agreement, and it is clear from the judgment of Bowen L.J. that Cotton L.J. had been consulted and the fact of his agreement ascertained before the judgments were delivered.

It is quite true that for the purposes of the judgments of Cotton and Fry L.JJ. this expression of opinion was unnecessary. The judgment of Bowen L.J. was a dissenting one, but I think had he taken a different view of Lord Cairns' Act he might well have arrived at the same conclusion as his brethren though on a different ground. The point was deliberately argued, being mentioned first by the Attorney-General, Sir Richard Webster, or one of his juniors, as appears at the bottom of p. 322 of the report, and being afterwards dealt with by Sir Horace Davey, who supported the view now put forward by the appellants.

In order to get rid of the effect of the opinions deliberately expressed by three judges of this Court it is in my judgment not enough to say "they are mere dicta." They are not views casually expressed on a point not really adequately considered, but they are arrived at and expressed with the same care and deliberation as if they had been necessary for the decision of the case. Although therefore they are not absolutely binding as would be an actual decision of the Court necessary to its judgment, they are entitled to such weight that we ought to follow them unless we find that they have been overruled or that they are inconsistent with previous decisions.

Dreyfus v. *Peruvian Guano Co.* (1) was decided more than thirty-two years ago. The case itself was taken to the House of Lords (2), but there is no allusion to the point in the speeches of any of the learned Lords, although Sir Horace Davey in his argument for the respondents put forward the same contention as that which had been rejected by the Lords Justices. The learned Lords came to the conclusion that an actionable wrong had been committed justifying the award of damages.

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(1) 43 Ch. D. 316.

(2) [1892] A. C. 166.

We next find the point mentioned in *Martin* v. *Price.* (1) In that case there were both an actual injury and a threatened injury. Kekewich J. had given damages for both. In the Court of Appeal it was contended that as regards the threatened injury—which was not a mere continuance of the actual injury—there was no jurisdiction to award damages, and that if there were it ought not to have been exercised. The Court allowed the appeal on the second ground, but in delivering the judgment of himself, A. L. Smith and Davey L.JJ., Lindley L.J. on the question of jurisdiction said this (2): [His Lordship read the passage read by the Master of the Rolls and continued :] The Court here I think must be taken to have regarded the question as to some extent an open one, inasmuch as they appear to have thought that they might have to make up their minds upon it. But it is possible they might have made up their minds by holding that they ought to follow *Dreyfus* v. *Peruvian Guano Co.* (3)

The case is next mentioned by A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (4), and is there treated by him as a "binding authority." Again in *Cowper* v. *Laidler* (5) Buckley J. referred to *Dreyfus* v. *Peruvian Guano Co.* (3) as an authority so far as he was concerned to be treated as a binding authority.

As to the suggestion that the views expressed in that case were not consistent with previous decisions, what we find is that in *Holland* v. *Worley* (6) and *Allen* v. *Ayres* (7) Pearson J. awarded damages in substitution for a prohibitory injunction where a wrong was not committed but only threatened, but the jurisdiction so to do was not questioned. In *Aynsley* v. *Glover* (8) the existence of the jurisdiction was assumed but it was not exercised. (9) Other cases were cited which were

(1) [1894] 1 Ch. 276.
(2) Ibid. 284.
(3) 43 Ch. D. 316.
(4) [1895] 1 Ch. 287, 319.
(5) [1903] 2 Ch. 337, 340.
(6) 26 Ch. D. 578.
(7) [1884] W. N. 242.
(8) L. R. 18 Eq. 544.
(9) L. R. 10 Ch. 283.

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either cases where before trial at all events if not before action a wrong had actually been committed, or cases where the wrong was continuing and the damages were extended accordingly, or cases of damages in lieu of a mandatory injunction: e.g., *Senior* v. *Pawson*. (1)

On the whole I cannot find that the opinions in question have been overruled in subsequent cases, or that they were inconsistent with any decision in which the point was raised. Under these circumstances I think we ought to follow the views of our predecessors and leave them, if not correct, to be overruled by the House of Lords. If this be correct, relief by injunction was the only relief which it was in the power of Romer J. to give as things stood at the date of his judgment, and as he was satisfied that the defendants were intending to commit what would amount to a legal wrong which if inflicted would involve substantial damage, he had no alternative except to grant the injunction. On this point the actual decision in *Martin* v. *Price* (2) seems to me to support the view just expressed. The appeal should in my opinion be dismissed.

YOUNGER L.J. The plaintiff and the defendants here are the owners of opposite premises which abut upon a narrow passage known as Albion Square, Leeds. The square is situated in the midst of the business quarter of the city.

Recently the defendants elaborated a scheme for the rebuilding of their premises in Albion Square and adjoining streets. They proposed to demolish their old buildings and erect upon the site a building greater in height and larger in size than the old, albeit a building, as I understand the learned judge's judgment, in every respect appropriate to its situation and immediate surroundings. The defendants having completed the pulling down of their old buildings and commenced the erection of the new, the plaintiff complained that the erection, even so far as it had proceeded, constituted an unlawful interference with some

(1) L. R. 3 Eq. 330.

(2) [1894] 1 Ch. 276.

at least of his ancient lights, and he asserted that the completion of the building in accordance with the defendants' proposed plans and elevations would greatly aggravate such interference. Accordingly on May 15, 1922, he commenced this action, claiming by his writ, in a form both prohibitory and mandatory, an injunction to restrain the interference of which he complained.

At the trial it appeared that at the date of the writ no unlawful interference with the plaintiff's ancient lights had in fact taken place. The defendants' new building had not then—it has not now—proceeded far enough. The action, in fact, in its origin was, and at the trial it remained, a quia timet action only, although, as I have said, the writ asked for a mandatory as well as for a prohibitory injunction. The action was tried by Romer J. in July of last year. In his judgment after the trial the learned judge stated his conclusion from the evidence on both sides to be that while, on the whole—this, his first conclusion, is stated in terms much more qualified than his second—that while, on the whole, he thought the plaintiff had established that on the completion of the defendants' new building there would be an interference with the access of light as previously enjoyed by his premises, sufficient to give him a cause of action against the defendants, yet he, the learned judge, was convinced—the change of expression is noteworthy—that if at the time of the trial the defendants' proposed building had been completed the case would have been one in which, guiding himself by A. L. Smith L.J. in *Shelfer's Case* (1) and by Lord Macnaghten in *Colls' Case* (2), he would have given damages in lieu of an injunction. The learned judge states in detail his reasons for expressing himself in terms so assured. As a result of the evidence he was, he said, satisfied that if the defendants' new building were erected and completed as proposed and intended :—

1. The interference with the plaintiff's legal rights would be small.

(1) [1895] 1 Ch. 287.

(2) [1904] A. C. 179.

2. The plaintiff could be adequately compensated in damages for any such interference.

3. It would be no hardship on him to allow the defendants' buildings to remain, they paying him a sum of money by way of compensation for any additional expense to which he might be put owing to the extended use of electric light or the diminution in the selling or letting value of his premises.

4. It would be a hardship on the defendants to prevent them from using their building site as proposed to the best advantage of their business when no harm would be done to the plaintiff beyond that for which he could be readily and adequately compensated in damages.

For these reasons the case, in the learned judge's opinion, was not a case for injunction. Deferring however to certain observations made in this Court in *Dreyfus* v. *Peruvian Guano Co.* (1), which, although not in accord with his own views, he felt he ought to treat as binding upon him, the learned judge held that he had no jurisdiction to award damages in lieu of an injunction where, as here, the injury to the plaintiff was threatened only and no actual wrong had even at the date of trial been committed by the defendants.

That was the learned judge's first decision. His second he seems to have regarded as its necessary corollary. The plaintiff had established a cause of action in respect of the injury he would sustain if the defendants' building proceeded to completion; he could not be required in this action to accept damages by way of compensation; he was entitled therefore to the injunction he sought, the findings of fact which I have just summarized notwithstanding. And the learned judge accordingly granted a perpetual injunction. The defendants appeal. As I see them the questions we have to determine are whether the learned judge was right in both or in either of these decisions, assuming as, for this purpose, but for this purpose only, we were invited by both parties to assume, that these findings of his were justified by the course of and by the evidence adduced at the trial.

(1) 43 Ch. D. 316.

To my mind the seriousness at the present day of both questions so raised can hardly be exaggerated. It was not contended on behalf of the plaintiff that, if these findings were correct, the case was, according to the existing rule of the Court, one for injunction if damages could be awarded. The learned judge's conclusion, on this hypothesis, was not contested. Nor do I think it could have been. The learned judge's decision accordingly if well founded involves this proposition, that it is the law of the Court that merely because damages are not immediately available as a remedy, if the plaintiff has a cause of action an injunction must issue, however oppressive to the defendant, and of however little advantage to the plaintiff it may be. For myself I would hesitate long before I accepted such a position. It would undo all recent progress in these matters. Gradually, and in later years especially, the Courts have come to recognize with a clearness which was hidden from them during a period not yet remote that injunctions in light cases not necessary for the adequate protection to a plaintiff's proprietary rights may injuriously affect interests other than the defendants' to an extent which the Court cannot properly ignore. Incautiously awarded such injunctions may impede, may, indeed, even entirely arrest properly progressive schemes of building development with consequences as injurious ultimately to the community as they are throughout oppressive to a defendant. It has become a commonplace amongst us that the restatement of the law and proper practice in such cases made by the House of Lords in *Colls' Case* (1) reduced the hitherto abundant flow of actions for injunctions in light and air cases to a mere trickle. Injunctions became no longer a matter of course; the real damage did not translate itself into a sum sufficiently substantial to be attractive. Cases of trivial interference no longer troubled the Courts. This state of things will not long continue if it is now to be taken that a learned judge in the position in which Romer J. here found himself is bound to act as he did. With a little management injunctions in such cases will be more certainly obtainable than they ever were; what one may now permissibly describe as the dangers of the former practice will speedily reappear in an aggravated form—their resurrection synchronising with schemes of building development, arrested by the war, now called for by the necessities of the times and in evidence on every side. To my mind accordingly both of the questions now presented to us are of the utmost general interest, and that must be my excuse for discussing them with an elaboration which I should not otherwise consider allowable.

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(1) [1904] A. C. 179.

Twenty-nine years ago in this Court the question raised by the first of the learned judge's two conclusions was described by Lord Lindley as one of very great importance. The Court then left it open. For effective answer it has not again been raised until now. The reason for this is not, I think, difficult to find. In 1894 and for ten years later, the opportunity of considering whether in an action for interference with light damages should be awarded in lieu of an injunction rarely presented itself. During the whole of that period and for at least eight years before its commencement: see *Scott* v. *Pape* (1), the doctrine supposed to be implicit in *Parker* v. *Smith* (2) had, although from time to time disclaimed, obtained practically complete ascendancy in all Courts below the House of Lords. The doctrine was that the dominant owner was entitled to the whole of the light which had been accustomed to pass through his windows for the statutory period. Interference with that right was in the nature of trespass. When it was established, injunction was the only appropriate remedy. The consequence was that in the vast majority of cases of even slight interference an injunction had become almost a matter of course, and the present question rarely arose in a practical form.

But the whole basis for that quite modern practice was in 1904 swept away by the decision of the House of Lords in *Colls* v. *Home and Colonial Stores* (3), reversing the decision of the Court of Appeal. According to the House of Lords the test of the right to maintain an action to restrain an obstruction of light is not whether it is a trespass but whether the obstruction complained of is a nuisance. The test of its seriousness is primarily not the large amount of light which is taken but the small amount of light which is left. In all such cases the Court must bear in mind the locality, regard too being had to light to which the dominant owner is entitled from sources other than that which has been obstructed. And the rule to be followed by the Court in granting damages or an injunction in such cases is thus laid down by Lord Macnaghten (1) in words which I quote at length. "In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money—if the defendant has acted in a high-handed manner—if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. . . . . But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the Court to protect some ancient lights, which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises."

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(1) (1886) 31 Ch. D. 554.
(2) (1832) 5 C. & P. 438.
(3) [1904] A. C. 179.

This judgment—and the speeches of the other Lords are

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(1) [1904] A. C. 193.

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in accord with it—so completely at variance, as it was, with the then existing practice of the Chancery Division, was little less than a new charter for building owners in what I may call relatively meritorious light cases. "Where damages are an adequate remedy, an injunction, and especially a mandatory injunction, ought not to issue." (1) This judgment accordingly relieved the Court from what, although self-imposed, had become the iron necessity of awarding injunctions in unsuitable cases. Of course it made no new law. What it did was to restate the law as it once had been, and as it ought always to have remained. The tradition only had been lost. But the practical result was in the matter of remedy to reaffirm the right and the duty of the Court, to administer justice in these cases more effectually than in its more recent practice it had been accustomed to do. I am here applying and adapting Lindley L.J.'s language in *Shelfer's Case* (2) with reference to Lord Cairns' Act itself. Is all this to be now superseded ? If the powers of the Court are as non-existent in the circumstances found by the learned judge as he has, however reluctantly, held them to be, the opportunity for awarding damages in lieu of an injunction in these cases—a most salutary power—will for the future present itself only in the rarest of instances and these not the best. It will, for instance, never be open where a building owner with neighbourly candour places his proposed plans before the adjoining owner of ancient lights and thus enables him to institute effective and well-informed proceedings before the work is commenced ; while the benefit of it will be at any rate available to a nimble defendant who is able to cause some actionable obstruction before the plaintiff can move. When to such considerations is added the further fact that the general interest of the community is largely concerned in this question, it would in my judgment be almost a calamity if, as a result, the Court were to find itself compelled in any case to award an injunction where, as Lord Lindley said, " none ought to issue " ; a position the more aggravating if it were left free to award damages only in cases which so far as the defendant was concerned were cases of relatively less merit.

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(1) [1904] A. C. 212.

(2) [1895] 1 Ch. 287.

In my judgment however the Court is placed in no such position of embarrassment. Its powers in this matter are, as I think, amply adequate to enable it to do what it conceives to be right in the present as in every other case where an interference with ancient lights is alleged.

The question of course largely turns upon the true effect of s. 2 of Lord Cairns' Act, which, although repealed, still remains operative. And in order fully to appreciate the bearing of that section upon the matters now in hand it is convenient to recall the position and powers before the Act was passed and in cases like the present of the Court of Chancery and the Courts of common law respectively.

In such cases where injury to ancient lights from proposed new buildings was apprehended it was then the constant course of the Court of Chancery to interfere by way of preventive injunction. But that Court did not so interfere in every case. In quia timet actions of this or any analogous kind it would only do so where there could be no doubt as to the inevitability of the prospective injury: *Salvin* v. *North Brancepeth Coal Co.* (1), and where the plaintiff showed, or the Court concluded, that by the threatened wrong the property of the plaintiff would be so irreparably injured that an action for damages would be no adequate redress: see *Emperor of Austria* v. *Day and Kossuth.* (2) "This is the very case for an injunction," said Lord Campbell in *Imperial Gas Light and Coke Co.* v. *Broadbent* (3), "because it is a case in which an action cannot sufficiently indemnify the party who is injured." Courts of equity, I think, rarely consciously ignored the extraordinary character of their own specific remedy of injunction—even if it were only prohibitory and not mandatory. But at the filing of the bill or before the motion for decree the defendants' offending building might have been erected and the damage to the plaintiff complete. In such a case it was the course of the Court, if

(1) (1874) L. R. 9 Ch. 705.

(2) 3 D. F. & J. 217, 240.

(3) (1859) 7 H. L. C. 600, 610.

the injury to the plaintiff's rights was sufficiently serious, and if he was not himself under some equitable disqualification —e.g., laches, to make a mandatory order.

But if there was a case in which in the view of that Court, according to its current practice, an injunction " ought not to issue," the Court would not issue one. In such a case the plaintiff would be relegated to his remedy at law. I return however to this aspect of the matter when I come to deal with the learned judge's second conclusion. I leave it for the moment.

As to the Courts of law their powers in awarding damages for obstruction to a plaintiff's ancient lights were up to a point adequate enough. Inasmuch as in these cases the plaintiff's injury resulted from a permanent structural obstruction the damages assessable and recoverable represented the depreciation in the value of the dominant tenement and were a complete compensation once and for all for the injury done: see *Moore* v. *Hall*. (1) Indeed in *Back* v. *Stacey* (2)—the foundation of most of the law on this subject—the jury, as Lord Macnaghten points out in *Colls' Case* (3), were directed to award damages which would have gone to the whole of the injury and not merely to the loss sustained up to the date of the writ. But the damages a Court of law might award, adequate as they were so far, were confined to such damages as flowed from the obstruction as it existed at the commencement of the action. If obstruction at that moment was only threatened, a Court of law could award nothing in that action. Damages again, arising from any further obstruction due to the upward progress of the offending building, were a fresh cause of complaint and could only be recovered in a subsequent action, necessitating accordingly a multiplicity of proceedings. Here was the trouble. In this matter of damages Courts of equity had no original jurisdiction. " Their province," says Lord Macnaghten in *Colls' Case* (4), " was simply to grant an injunction in aid of the legal right

(1) (1878) 3 Q. B. D. 178.
(2) (1826) 2 C. & P. 465.
(3) [1904] A. C. 179, 186, 187.
(4) [1904] A. C. 188.

where there was danger of irreparable mischief, or where an injunction was required to prevent multiplicity of actions."

It was this state of things that Lord Cairns' Act was passed to remedy. Extracting from s. 2 the provision applicable to the present case we find that section provides that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction . . . . against the commission or continuance of any wrongful act . . . . it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction . . . . and such damages may be assessed in such manner as the Court shall direct." This section gave a new power to the Court of Chancery: *Aynsley* v. *Glover* (1); it did much more than effect a change in procedure, and I am entirely with the learned judge in the Court below in his statement that were it not for the use in the section of the words "to the party injured" its effect is as clear as possible. He thus describes it: "In all cases where the Court has jurisdiction to entertain an application for an injunction against the commission of any wrongful act, that is to say, in cases where no wrongful act has been committed but is merely threatened, it may award damages in substitution for an injunction. The words seem plain." I agree. I may perhaps state the same thing in a different way. The section gave the Court of Chancery powers to substitute a common law remedy as extensive as its own for its own equitable remedy in respect of a cause of action purely equitable: see *Ferguson* v. *Wilson*. (2) Moreover, I would add that in view of the preventive jurisdiction in these cases constantly being exercised by the Court of Chancery at the time when the Act was passed it is almost inconceivable that if the power to award damages was to be conferred upon that Court at all it would not be conferred in these cases. To have withheld it in them would have reduced the remedial effect of the statute to small proportions indeed.

And that that power was not withheld, that on the contrary

(1) L. R. 18 Eq. 544, 554. (2) (1866) L. R. 2 Ch. 77, 88.

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the power by the Act given to the Court of Chancery was exercisable in cases where either the apprehended injury was not begun or was not complete when the bill was filed or writ issued, was not for many years the subject either of doubt or question. Up to December, 1889, the course both of decision and statement was all one way, and very striking is its constant uniformity.

By way of illustration of this I will cite first, because of the eminence of the judges concerned in them, two decisions pronounced in 1863, one by Lord Westbury and the other by Wood V.-C. as he then was. *Isenberg* v. *East India House Estate Co.* (1) was a case in which practically the whole of the offending height of the defendant's building was erected after bill filed, yet the Lord Chancellor, applying Lord Cairns' Act, refused on appeal to maintain the mandatory order made by the Master of the Rolls and directed an inquiry as to the entire damage sustained by the plaintiff to be taken before himself.

The case of *Senior* v. *Pawson* (2) before Wood V.-C. is perhaps from the present point of view even more striking. There when the bill was filed, as it itself alleged, no damage whatever had been done. In that case at the trial, however, the Vice-Chancellor adopted the same course as Lord Westbury had taken in *Isenberg's Case.* (1)

I pass over, merely mentioning them, the two decisions of Pearson J. which were so much referred to in the arguments before us, and which, at the lowest, assume the range of the Act to be as I am now stating it, with as a result damages actually awarded on that footing. They are *Holland* v. *Worley* (3) and *Allen* v. *Ayres.* (4) I go on to three further decisions, all of them before *Dreyfus* v. *Peruvian Guano Co.* (5) in the Court of Appeal, the case with which the difficulty in this matter originates. I select these three decisions for special reasons: the first, because it is a decision of Sir George Jessel, whose views in this matter, as supporting his own, were referred to by Bowen L.J. in the *Dreyfus Case* (1); the second, because it is a decision of Fry L.J., who found himself in agreement with Bowen L.J. in what he there said; the third, because it is a decision of the Court of Appeal, given six months before the *Dreyfus Case* (1), and one to which that Lord Justice was himself a party.

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(1) 3 D. J. & S. 263.
(2) L. R. 3 Eq. 330.
(3) 26 Ch. D. 578.
(4) [1884] W. N. 242.
(5) 43 Ch. D. 316.

Sir George Jessel's case is *Aynsley* v. *Glover* (2), already referred to on another point. That was a purely quia timet action, and the Master of the Rolls prefaced his judgment with the remark that he wished to state his own views upon the subject of ancient lights clearly, so that if they were wrong they could be corrected elsewhere, and if they were right they might serve as a guide for the future; and it is not too much to say that the judgment, although only given on motion, has ever since been regarded as of the highest authority. Towards the close of it the Master of the Rolls refers to Lord Cairns' Act. He intimates his opinion that the Act certainly extends to cases where before it was passed the Court of Chancery would have granted an injunction, and in these cases it gives the Court power to substitute damages in its place. He goes on to say that the power has been conferred no doubt usefully to avoid oppression sometimes practised in these suits by plaintiffs—anticipating in this passage the fuller statement by Lord Macnaghten in *Colls' Case* (3) already quoted—and he concludes as follows (4): "If I had found by the evidence that there was in this case a clear instance of very slight damage to the plaintiffs—that is, some 20*l*. or 30*l*. or 40*l*., but still very slight—and a very large, material, substantial damage to the defendant, I should be disposed to hold that that was a case in which this Court would decline to interfere by injunction, having regard"—I emphasize these words—"to the new power conferred upon me by Lord Cairns' Act, to substitute damages for it."

It must, I think, be agreed that the Master of the Rolls in this passage assumes in the clearest terms the power of the Court under Lord Cairns' Act to award damages in an action

(1) 43 Ch. D. 316.
(2) L. R. 18 Eq. 544.
(3) [1904] A. C. 179.
(4) L. R. 18 Eq. 544, 555.

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which commenced as and remained a purely quia timet action.

The case before Fry L.J. sitting as a judge of first instance is that of *Fritz* v. *Hobson*. (1) Speaking of Lord Cairns' Act the learned judge used these words: "Damages cannot be an adequate substitute for an injunction unless they cover the whole area which would have been covered by the injunction, and that is often one difficulty in giving damages in lieu of an injunction." The jurisdiction, it will be noted, is in no way questioned.

And it was expressly recognized and affirmed, and the judgment of Fry L.J. was quoted and approved by Lord Esher in the third of the cases which I desire to cite at this stage, and because of its importance here, in some detail. The case is that of *Chapman, Morsons & Co.* v. *Guardians of Auckland Union*. (2) There the point arose in a very neat form. The action commenced in the Chancery Division was for an injunction to prevent the defendants from causing a nuisance in the future by discharging sewage into a stream. At the trial the learned judge was of opinion that a nuisance was caused by such discharge of sewage, but only in an exceptionally dry season such as the season of 1887 was. At the time of the trial the nuisance had passed and was not likely to recur except in such another season. He accordingly refused an injunction, but gave the plaintiff 25*l*. damages. Bowen L.J. in his judgment describes what these damages were: "They were not," he says, "given for damage in past years, which had accrued when the writ was issued, but were given in respect of damage in 1887, which had not accrued when the writ issued, and in substitution for the injunction claimed by the plaintiffs, which was no longer wanted, though reasonably claimed at first in respect of a danger which had since passed away."

Now in that case the plaintiffs had not given the notice of action as required by s. 264 of the Public Health Act, 1875. It was not disputed that if the object of the action was an injunction, and damages only subsidiary, no such notice was necessary. But it was contended that when the injunction was refused the damages could no longer be subsidiary, they became damages recovered in a common law action for nuisance, assessable under existing rules up to the date of the judgment, but not recoverable in an action of which no notice had been given. The Court of Appeal, however, held that the trial judge had power to give such damages in substitution for an injunction in accordance with the Chancery practice under Lord Cairns' Act, although no notice had been given. The exact point is stated thus in Lord Esher's judgment. After saying that Lord Cairns' Act gave the Court of Chancery power to give damages in substitution for an injunction, he proceeds (1): "I take it that the view expressed by Fry L.J. in *Fritz* v. *Hobson* (2) is correct, viz., that the Act gave the Court of Chancery power not only to give damages in respect of past injury, but to give them alternatively instead of an injunction, and therefore in respect of damage which was prospective when the writ issued. Where that existed, and the action was in Chancery for an injunction, I do not think that the provision with regard to notice of action was applicable."

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(1) 14 Ch. D. 542, 557.

(2) 23 Q. B. D. 294, 302.

Bowen L.J. in his judgment is equally express. He affirms the power of the learned judge to award the 25*l.* for damage, prospective, at the date of the writ, and he sums up the matter thus (3): "If he"—that is the trial judge—"comes to the conclusion that, though there was a bona fide claim for an injunction at the time when the action was brought, an injunction is not necessary and that damages are an adequate relief in substitution for an injunction, he may give such damages."

Now, as Sir George Jessel pointed out in *Aynsley* v. *Glover* (4), if I may again refer to that case, the time for considering whether damages shall, under Lord Cairns' Act, be given in substitution for an injunction is the trial. The principles upon which on motion the Court had been accustomed to grant an interlocutory injunction were not affected

(1) 23 Q. B. D. 294, 298.
(2) 14 Ch. D. 542.
(3) 23 Q. B. D. 294, 304.
(4) L. R. 18 Eq. 544.

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by the Act. The cases cited accordingly very clearly show that the jurisdiction of the Court at the hearing to award damages in substitution for an injunction is existent as much where the interference is prospective and only threatened even at the hearing as where it was prospective and threatened at the date of the writ. That it was existent in the latter case is promulgated by Bowen L.J. himself in the case last cited. And this really carries the former case with it. In neither could damages be recovered at law; and if damages prospective and threatened at the date of the bill could be recovered, but none, if these still remained prospective and threatened at the hearing, this strange result would follow: that a plaintiff could easily make the statute inapplicable to his case by at once moving for an interlocutory injunction, and on this application—to which the provisions of the statute were not relevant—obtaining an order which remained operative until the hearing of the cause. And very possibly it was to meet this very objection that the assertion was frequently made that the only injunction for which the Court might under the Act award damages by way of substitution was a mandatory injunction. And true it is that many such orders have in these cases been made. But this contention was not correct. The statement of A. L. Smith L.J. in *Shelfer's Case* (1) that Lord Cairns' Act applies as much, in point of jurisdiction, to a case where the plaintiff's action is for a preventive injunction as it does where he claims relief by way of a mandatory order is now, I think, accepted. Nor was that position contested before us, and it is, I think, clear that the Court has under the Act jurisdiction—how that jurisdiction will in any case be exercised is another matter—but it has jurisdiction to award damages in substitution for the injunction as much in the one case as the other.

Now this line of authority is surely most striking. It shows very clearly that the section is applicable where the damage is prospective at the date of the writ as much as in any other case. It shows that orders on that footing might

(1) [1895] 1 Ch. 287, 319.

be made under the Act, not only where the injury prospective at the date of the writ was complete at the date of the judgment: *Chapman, Morsons & Co.* v. *Guardians of Auckland Union* (1), but where both the damage and the building to cause it were in lights cases in whole or in part prospective also at the date of the trial: *Senior* v. *Pawson* (2); *Holland* v. *Worley* (3); *Allen* v. *Ayres* (4); *Aynsley* v. *Glover*. (5) It shows that this result is inevitable, and indeed consequential so soon as it is recognized that damages may be given in substitution for a preventive injunction: *Shelfer's Case* (6), and that when so given they will cover the whole area of the injunction whose place they take: *Fritz* v. *Hobson* (7)

And this brings us at last, I fear at long last, to the observations of Bowen L.J. in *Dreyfus* v. *Peruvian Guano Co.* (8), which, concurred in as they were by Cotton and Fry L.JJ., raise the difficulty which has not since been judicially set at rest. Now of course we are very familiar with the judicial warning that the observations of a learned judge, however unqualified they may seem to be, are, primarily at least, to be taken and understood only in relation to the situation actually before him and to the question under discussion as it then presented itself to his mind. It is, as it seems to me, very necessary to have this warning in mind in any endeavour fully to appreciate the true intent of these observations of the Lord Justice with which we now have to deal. It is especially so by reason of the fact that the situation, as it presented itself to the mind of the Lord Justice, and I think of his learned colleagues also, was, in the event, entirely displaced by the House of Lords on appeal.

Now my Lord has in his judgment fully described the nature of the proceedings in the *Dreyfus Case* (9), and my own attempt to disentangle from the very confused proceedings the actual situation as it presented itself to the Court of Appeal had been made before I was privileged to see his

(1) 23 Q. B. D. 294.
(2) L. R. 3 Eq. 330.
(3) 26 Ch. D. 578.
(4) [1884] W. N. 242.
(5) L. R. 18 Eq. 544.
(6) [1895] 1 Ch. 287.
(7) 14 Ch. D. 542.
(8) 43 Ch. D. 316, 333.
(9) 43 Ch. D. 316.

judgment. I retain it only because I am, I think, approaching the question from a somewhat different angle.

The contest in the litigation between the Dreyfus firm and the Peruvian Guano Company was as to the ownership of eleven cargoes of guano shipped in 1880 from Peru by the Peruvian Government. The company claimed these cargoes as consignees for value under a contract with the Peruvian Government and took and claimed to take possession of them. The plaintiffs came forward alleging, and correctly alleging as the events proved, that the cargoes were theirs by right, and that they were entitled to stop the captains of the vessels from delivering the cargoes to the company and to prevent the company from taking them. They commenced their action on April 27, 1880. "This action"—says Kay J. (1)—"treated as an action to recover the cargoes then at sea, and to prevent the company from receiving them, was commenced in the Chancery Division in order to obtain an injunction to prevent the threatened receipt by the company, and it is not denied that if the company had taken possession of the goods under their claim of right, after the commencement of the action, the Chancery Division, under Lord Cairns' Act, would have had jurisdiction to give damages."

This statement, it will be found, was contested in the House of Lords (2), but it was confirmed and acted upon by the House in that the last stage of the litigation.

Now the cargoes were in fact taken possession of by the company, but they were taken or were treated as having been taken possession of under a consent order made in the action on April 30, 1880, on the plaintiffs' application then made for an injunction and receiver. It was upon the effect of this order, on the rights of the parties apart from it, that the ultimate contest in the action largely turned.

In accordance with the provisions of that consent order the cargoes as they arrived in England were received by the company; some of them were sold and their proceeds placed in medio as directed by the order. On December 17, 1880, however, the consent order was superseded by the appointment of a receiver. To him, as directed by the Court, the company delivered the still unsold cargoes in their possession and paid over the proceeds of those already sold. Later, but in every case before the trial—this is here the important thing—all these cargoes were sold by the receiver, and at the trial the proceeds were either in his hands or in Court.

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(1) (1889) 42 Ch. D. 66, 73.

(2) [1892] A. C. 166, 180.

Proceedings after the receiver's appointment were very dilatory. It was not until January, 1885, that the action came on for trial. The learned judge, Bacon V.-C., was on all points against the company. He declared that the plaintiffs were entitled to the cargoes and their proceeds, and with reference to the company's wrongful acts, as he thought them, he directed an inquiry "as to the damages sustained by the plaintiffs by reason of the detention by the defendant company of the cargoes"—the inquiry around which all the subsequent controversy raged. The judgment also disallowed the company their expenses in respect of any of the cargoes with an exception not here material. The whole basis of the judgment was that the company from the moment of their threats had been wrongdoers on whom were properly visited the consequences of all that subsequently happened to the cargoes and in the action. To that state of things the inquiry was directed.

The company appealed. The Court of Appeal affirmed the Vice-Chancellor's order without reservation, Bowen L.J. however dissenting. It was the view of the Lord Justice then as throughout the whole litigation that nothing that subsequently happened was legally attributable to the company's threats, which were the only wrong the company had committed, or were deemed to have committed. The consent order, the appointment of a receiver, were both of them in his view actus curiæ, for which the company were no more responsible than the plaintiffs. The company had wrongly asserted their rights; that was all. This view however did not prevail at that time with the other members of the Court, and the company appealed to the House of Lords.

There the order of the Vice-Chancellor was varied in the respect that the company were then declared entitled to be reimbursed their disallowed expenses. The inquiry directed by the judgment was however left untouched by the House. It was this variation in the judgment with the observations in the House leading to it that occasioned the subsequent difficulties in the lower Courts. I have already referred to the basis of the inquiry as directed by the Vice-Chancellor. In terms, as I have said, it remained unaltered by the House of Lords but, while that was so, Lord Watson, who presided, expressed his opinion to be that the actual receipt of the cargoes by the company must at least be regarded as a neutral and not an adverse act of possession. The difficulty subsequently experienced in the lower Courts —it was finally resolved on the final appeal to the House of Lords—was to square the original inquiry based on the company's wrongful acts with this view of their action taken by Lord Watson. It put the Court in a "cruel difficulty" as Fry L.J. said.

The inquiry was in due course proceeded with, and in March, 1889, the Chief Clerk made his certificate assessing the damages for the detention on the footing (inter alia) of loss of interest on the proceeds of sale from date of receipt right down to date of judgment, and further damages at 4 per cent. per annum for non-payment of these moneys from date of judgment to date of certificate. The company thereupon applied to the Court to discharge this certificate, and to direct that the inquiry should proceed on the footing that the plaintiffs were entitled to no damages at all or that the certificate should be varied by finding that no actual detention by the company had taken place. This application was dismissed by Kay J. and, on appeal, by the Court of Appeal, Cotton and Fry L.JJ., Bowen L.J. again dissenting. On this occasion, however—that on which the last named made the observations now in question—the divergence of opinion among the Lords Justices was more apparent than real. Bowen L.J. expressed his original views as to the non-responsibility of the company for what had happened and held himself entitled to give them effect by reason of what had since been said in the House of Lords.

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It is, I think, clear that in view of these observations the Lords Justices—particularly Fry L.J.—now took the same view as Bowen L.J. of the company's non-responsibility; and their difference only was that Cotton L.J. and he could not disregard the terms of the inquiry as to damages which in their view embodied a decision of the House of Lords that for the actual detention of the cargoes from the plaintiffs the company was to be responsible whatever individual noble Lords might have said on the subject; "I have never felt myself so much embarrassed as I have in this case," said Fry L.J. (1) "It appears to me that, whatever course this Court takes, there is a danger that we are acting in some way at variance with the decision of the House of Lords. If we take one course, we seem to me to be going counter to the expressed opinion of the learned Lords. If we take the other, we seem to me to be reversing a portion of the decree which the House of Lords has thought fit to affirm." In the result but without conviction Cotton and Fry L.JJ. took the first course. Bowen L.J., perhaps more courageously, although as appeared in the result erroneously, took the second.

Here however was the situation to which the observations of Bowen L.J. that have since caused so much difficulty were addressed. The cargoes had all been disposed of; there were no more cargoes to arrive; the proceeds of all of them were in Court or were in the hands of the receiver; any damage sustained by the plaintiffs was complete; no further damage was then either threatened or intended by the company, or was in fact then possible. It was moreover the declared conclusion of Bowen L.J., and the same opinion would have been expressed by the other Lords Justices had they considered themselves at liberty to express one, that what the plaintiffs had sustained at the hand of the company was not, in any legal sense, damage at all. It was damnum sine injuria.

Now Sir Horace Davey was counsel for the plaintiffs, and in these circumstances, being invited by Bowen L.J. to assume for the purpose of his argument that there had been no tortious act at all, on behalf of the company, he contended, as Bowen L.J. says (1), that still "there was nothing wrong in giving damages, because Lord Cairns' Act clothed the Court of Chancery with the jurisdiction, where no wrong had been done at all, nevertheless, on a threat of injury which would give rise to the jurisdiction for injunction, to give damages in substitution for such injunction." This was the contention with which the Lord Justice was dealing in the passage now in question which immediately follows: "I am of opinion that the 2nd section . . . . of Lord Cairns' Act, did not clothe the Court of Chancery with such a jurisdiction. It is true the section applies in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction, but the only weapon with which the Court is armed by virtue of the section is to award damages to a party injured, which must, I think, mean damages where damages have arisen, and in a case where no damages have arisen in the ordinary sense of the term as known to lawyers, I am of opinion the Court has no power to give damages."

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(1) 43 Ch. D. 316, 338.

Now that these observations were at all events primarily addressed to Sir Horace Davey's contention is made plain by the context which I have quoted. That they were addressed to it as an almost extravagant contention—namely, that the Court under Lord Cairns' Act could award compensation where threats only had been made and where no damage, as distinct from loss, had been or could be sustained in consequence of them—is shown also by the statement twice made by the Lord Justice that in presuming to deal with it he is only a proselyte at the gate in matters of equity.

All this is certainly true, but the very grave question remains for us now—one made more difficult by later judicial statements as to the effect of the Lord Justice's observations —whether it is right to attribute to him any intention to do more by the words that he used than to answer that contention of Sir Horace Davey's as applied to the actual facts

(1) 43 Ch. D. 316, 333.

before him—whether putting it otherwise it is permissible to impute to him any intention of dealing in any way with cases where the injury threatened, when it did supervene, would sound in real damages to the plaintiff for which the defendant even in a Court of law could be made responsible after they had been sustained. Did the Lord Justice really intend to lay it down that not only must the damages be damages of which a Court of law would take cognizance if they had been sustained—as to which every one agrees—but that these damages must actually have been sustained at the date of the writ, or at all events by the date of the judgment ?

It is in order to attempt an answer to that question, satisfactory at least to my own mind, that I have gone into the earlier cases on the Act and the details of the *Dreyfus Case* (1) itself, and as a result the answer, as I think, is that the Lord Justice was consciously dealing only with Sir Horace Davey's contention as presented, and that this can be shown from the judgment itself.

I most fully agree, of course, that the language used by the Lord Justice is language of the widest generality. Except as restricted by its context it is unqualified in its terms. I do not myself doubt that most of the difficulty which it has subsequently occasioned is due to the fact that it has been read apart from the context. I hope, however, here to show how strong that context is.

Now there are three varieties of what I have called real damages, all, any, or none of which may be within the ambit of Lord Cairns' Act.

(*a*) Damages threatened only at the date of the writ.

(*b*) Damages existing by the date of the writ ; with further damage then threatened.

(*c*) Damages threatened only both at the date of the writ and at the date of the trial.

(*a*) and (*b*) may be taken together. Clearly (*b*) is a clearer case for the application of the statute than (*a*). I will test the question therefore both as to (*a*) and (*b*) by considering whether the Lord Justice can have intended to include case (*a*) in his observations. Now case (*a*) is a case which A. L. Smith L.J. in *Shelfer's Case* (1) assumed the learned Lord Justice to be dealing with. And yet it is, I think, almost demonstrable that he had no such intention. And the final appeal to the House of Lords shows that, if he had so intended, his statement as to the effect of the Act would, in this respect at least, have been erroneous. But he cannot have intended to deal with any such case as case (*a*). As applied to that case his observations would have been directly opposed to the decision of the Court of Appeal in *Chapman, Morsons & Co.* v. *Guardians of Auckland Union* (2), a case actually cited and relied on by both sides in the argument and one in the decision of which the Lord Justice had himself taken so prominent a part only six months before. Moreover Cotton and Fry L.JJ. both expressed their concurrence with Bowen L.J.'s observations. They could not have supposed them to have any reference to case (*a*), because by adhering as they did to the Chief Clerk's certificate they were actually awarding in that very case damages threatened only at the date of the writ. But further, if the Lord Justice did intend his observations to extend to such a case, they have since been so far overruled; for in the House of Lords, to which the case proceeded for a second time on appeal, it was finally and deliberately declared that the cargoes having been in fact and in law illegally detained by the company from the respective dates of arrival at the port of discharge until the date when the receiver was appointed but not longer, the company were liable in damages accordingly and liable on the inquiry directed in the action, prospective though they were at its commencement.

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(1) 43 Ch. D. 316.

It being then, as I think, clear that the Lord Justice excluded (*a*) and consequentially (*b*) from his observations, did he intend to include (*c*), our present case? The answer also, I think very clearly in the negative, is reached in another way. For everything the Lord Justice did say and intend he vouched the authority of Sir George Jessel. "I am specially informed," he says, "by one who certainly can speak with authority on the point, that the view which I am now taking on this subject is the view taken by the late Master of the Rolls." But the view taken by Sir George Jessel of the application of Lord Cairns' Act to case (*c*)—to our present case—is on record. It is to be found in *Aynsley* v. *Glover* (1) in the passage I have already set forth. In his view case (*c*) was within the Act. But the Lord Justice's observations were concurred in both by Cotton L.J. and Fry L.J. That fact shows also, as I think, that they are not to be read apart from their context. Read literally they would be in conflict with *Fritz* v. *Hobson* (2), a decision approved by the Court of Appeal in the *Bishop Auckland Case.* (3) It is difficult to suppose that Fry L.J. in any assent he gave was ignoring any opinion of his own which had been so approved, and as approved brought to his notice. In view of the fact that he was actually awarding damages prospective at the date of the writ, the terms in which Cotton L.J. expressed his approval are also significant.

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(1) [1895] 1 Ch. 287.

(2) 23 Q. B. D. 294.

On the whole therefore I reach the conclusion that neither case (*a*) nor case (*b*) nor case (*c*) was within the purview of the Court in connection with the observations of the Lord Justice. I cannot think that the Lord Justice had it in his mind to deal even remotely with any of these three cases which, since the passing of Lord Cairns' Act, had been the subject of decision in an unbroken continuous line of high authority, no reference to which was made by the Lord Justice, while one case from it only had been cited to the Court.

But it is very true that Lindley L.J. in *Martin* v. *Price* (4), in a case in which the damage had commenced at the date of the writ, stated on behalf of this Court, of which Davey L.J. was a member, that the Court of Appeal had in the *Dreyfus Case* (5) "expressed a very clear opinion" against the existence of a jurisdiction in the Court to award damages by way of compensation for an injury not yet committed but only threatened or intended. I feel, I need hardly say,

(1) L. R. 18 Eq. 544.
(2) 14 Ch. D. 542.
(3) 23 Q. B. D. 294.
(4) [1894] 1 Ch. 276.
(5) 43 Ch. D. 316.

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the overwhelming authority of such an observation coming from such a Court. On the other hand is it too bold to suggest that the Lord Justice is reading the observations of Bowen L.J. in the comprehensive form in which they are couched? So read they do amount to a very clear opinion to the effect stated. It takes a very elaborate analysis of the whole case to realize the permissible content of these observations read as applied to the case then before the Court and as justified by the Lord Justice himself.

The effect of them too has been dealt with, as I have said, by A. L. Smith L.J. in *Shelfer's Case* (1) and also by Buckley J. in *Cowper* v. *Laidler* (2), but I think it may fairly be said, in view of the form of words used, that in each instance the description of the effect of Bowen L.J.'s observations was taken from Lindley L.J.'s statement in *Martin* v. *Price.* (3)

On the whole, therefore, I have arrived at the conclusion that this question cannot in this Court be regarded as concluded by anything said in the *Dreyfus Case.* (4) In *Martin* v. *Price* (3) it was treated as open, on a view of Bowen L.J.'s observations which, as I am forced to think, was mistaken. Even however if I am not entitled to that opinion, it must at least, I think, be agreed that the words of the Lord Justice are not so clear as they seem, that if read in this wide sense they were entirely obiter, and that in a case in which at length the matter urgently calls for decision it is now the duty of this Court to decide this still open question upon authority and principle.

This brings us back to the section itself and to its effect as stated by the learned judge. Fortified not only by its language but by the long line of authority which I have traced I express my own clear opinion that the learned judge in this case had under the section full power and authority to award damages in substitution for an injunction, the only doubt being whether the presence in the section of the words "party injured" precluded him from awarding

(1) [1895] 1 Ch. 287.
(2) [1903] 2 Ch. 337.
(3) [1894] 1 Ch. 276.
(4) 43 Ch. D. 316.

damages before they had been sustained. In my judgment these words have not that effect. In view of what has already been said on this subject both in the Court below and here, I need not elaborate this point. The words of themselves have not, I think, struck any of us as formidable. I would only add to what Romer J. has said on this subject this one remark. It not being now contested that damages may under Lord Cairns' Act be awarded in substitution for a preventive injunction, it follows that in every such case when awarded at all they must be awarded in respect of an injury which has not been suffered at the time when the order is made. But if this difficulty is to be obtruded further, there is from it an easy mode of escape which would satisfy the literal terms of the section. Let the Court, as the learned judge in another connection suggested, make in such a case as the present a declaration that the proposed buildings when erected will constitute a legal wrong, and give the plaintiff liberty to apply for an inquiry as to damages after the buildings have been completed as proposed. By that time he will be a "party injured" in the strictest sense of the statute. And here I may mention that in *Colls' Case* (1) Lord Macnaghten, with however no reference to this Act, suggested a form of order in this sense. Referring to the desirability that an injunction expressed in general terms should restrain the defendant from erecting his building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows he suggested that if the action was brought to a hearing before the defendants' new building was completed and there then seemed to be ground for the plaintiff's apprehensions, an order might conveniently be made in that form with costs up to the hearing "and liberty to the plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages as he may be advised." Lord Macnaghten had in mind, it would seem, a case unlike the present—one in which it might at the trial be uncertain to the judge whether when the building

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(1) [1904] A. C. 179.

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was completed it should be allowed to remain with damages substituted, or whether it should not. The form of order suggested assumes without question the power of the Court in such a case finally to award damages in lieu of committing the defendant to prison or ordering the destruction of the offending building. This form of order has been frequently followed, it has been said, as a common form order. See Gale on Easements, 9th ed., p. 533. A good example of it will be found in *Anderson* v. *Francis* (1), before Swinfen Eady J. It is a little strange that in the present case the learned judge has not so far given effect to his own views as to adopt it. But he has not done so.

Being of opinion for all these reasons that it was open to the learned judge in the present case and on the facts as found by him to award damages as he desired to do, and being also of opinion that on these facts it was his duty so to do, the second conclusion at which he arrived does not so far as I am concerned arise.

But as I am fully conscious that my views on his first conclusion may be wrong, I desire to say a word or two on his second—namely, that having no power under Lord Cairns' Act to award damages where at the hearing the injury was only threatened he had no option—what was threatened being an injury—but to grant an injunction, relatively trivial though in his opinion the injury threatened would be. Here in my opinion also the learned judge was mistaken. On the present hypothesis Lord Cairns' Act has no application to the case. The position of the Court is as if that Act had never been passed. Now as I understand that position the Court of Chancery never granted an injunction in cases in which it thought "none ought to issue," although its opinion as to what these cases were undoubtedly varied from time to time. Lord Cairns' Act enabled the Court to award damages in cases where apart from it the Court would have granted an injunction. It did not force the Court to grant an injunction in any case in

(1) [1906] W. N. 160.

which apart from the Act it would have granted none. If therefore apart from the Act the plaintiff would have been left to his remedy at law, the Court would still leave him to that remedy in any case like the present where the Court on the facts came to the conclusion that the case was not one for injunction. In such a case the Court would dismiss the bill without prejudice to an action for damages, to include, if it thought fit so to provide the costs of the suit: see, e.g., *Wood* v. *Scarth.* (1) The Judicature Act has now simplified that procedure. The Chancery Division has now the same power to award damages that the King's Bench Division possesses. There is no necessity now for a fresh action. The Court has now, as it seems to me, the fullest power, (apart from Lord Cairns' Act altogether), in a case like the present, adopting the precedent suggested by Lord Macnaghten in *Colls' Case* (2), to declare at the hearing that the defendants' building when completed according to their proposed plans and elevations will constitute a nuisance to the plaintiff's ancient windows, but one that will be adequately compensated in damages; it has the power to give the plaintiff his costs up to the hearing, and reserve to him, as in *Anderson* v. *Francis* (3), liberty to apply on the completion of the defendants' building for an inquiry as to damages. The order could also reserve to the plaintiff his full rights should the defendants to his detriment proceed with their building otherwise than in accordance with their proposed plans and elevations. By an order in such a form the Court would be relieved of any obligation to do that which, as it seems to me, it should never do, that is, grant an injunction where in its proper opinion "none ought to issue." I conceive this to be of the very first importance. I must not however further extend this judgment, already far too long, by any amplification of this branch of the case.

The result of the whole matter is that in my opinion the learned judge here was at liberty on the facts as found by

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(1) (1855) 2 K. & J. 33.
(2) [1904] A. C. 179.
(3) [1906] W. N. 160.

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him to refuse to award an injunction, and I think the appellants are entitled to say that on the learned judge's view of the facts he ought to have done so.

Appeal dismissed.

Solicitors for appellants: *Jaques & Co., for Bointon, Son & Malcolm, Leeds.*

Solicitors for respondent: *McKenna & Co., for Pettitt, Carter & Wade, Leeds.*

W. I. C.

ASTBURY J.
1923
March 9, 22.

In re SHREWSBURY ESTATE ACTS.

SHREWSBURY *v.* SHREWSBURY.

[1922. S. 5536.]

Annuity—Income Tax—Jointure—Statutory Power—" Clear of all deductions whatsoever for taxes or otherwise "—Shrewsbury Estate Act, 1843 (6 *&* 7 *Vict. c.* 28 (*Private*)), *ss.* 7, 9, 10.

The Shrewsbury Estate Act, 1843, s. 7, empowered any owner in possession by deed to appoint a jointure to his wife not exceeding the yearly sum of 3000*l.* " clear of all deductions whatsoever for taxes or otherwise," but by ss. 9, 10 the estates were not at any time to be subject to the payment of more than 6000*l.* in respect of jointures, and there were complicated provisions as to the way any excess should be borne.

By a jointure deed of July 20, 1910, the late Earl of Shrewsbury exercised his statutory power by appointing two jointures of 1500*l.* to the plaintiff "clear of all deductions whatsoever for taxes or otherwise."

The Earl died on May 17, 1921, and the question arose whether the plaintiff's jointures were payable free from income tax.

During the Earl's life a prior jointure of 1000*l.* had become payable to his son's widow. This was appointed under a later Act of 1862 and was admittedly subject to tax. There were no other jointures:—

Held, both on general principles and also on the construction of the 1843 Act as a whole, that the plaintiff's jointures were not payable free from income tax.

Gleadow v. *Leetham* (1882) 22 Ch. D. 269, 272 explained.

In re Bannerman's Estate (1882) 21 Ch. D. 105 doubted.

Originating Summons.

By a jointure deed of July 20, 1910, made between the late Earl of Shrewsbury of the one part and the plaintiff his wife of the other part, the Earl in exercise of his powers under the Shrewsbury Estate Acts, 1843 and 1862, as beneficial owner appointed unto and to the use of his wife the plaintiff for life for her jointure, subject to any rentcharges already limited under the powers of those Acts: First, the annual sum or yearly rentcharge of 1500*l.* "clear of all deductions whatsoever for taxes or otherwise" to be charged upon the settled estates mentioned in s. 7 of the 1843 Act (with immaterial exceptions), and to be paid and payable from the Earl's decease by equal half-yearly payments on August 1 and February 1 in every year, the first half-yearly payment thereof to be made on such of the said days as should first happen after the Earl's decease: Secondly, the further annual sum or yearly rentcharge of 1500*l.* "clear of all deductions whatsoever for taxes or otherwise" to be charged as aforesaid and to be paid and payable from and after the decease of the survivor of the Earl and his mother (a prior jointress) by equal half-yearly payments on August 1 and February 1 in every year, the first half-yearly payment thereof to be made on such of the said days as should first happen after the decease of the survivor of the Earl and his mother.

The Earl's mother died on July 29, 1912.

The Earl died on May 17, 1921, whereupon his grandson, the infant defendant, son of the late Viscount Ingestre, who died on January 8, 1915, became tenant in tail male in possession of the estates.

On November 17, 1922, the plaintiff issued this summons to determine (inter alia) whether upon the true construction of the Shrewsbury Estate Acts and the jointure deed her jointures were payable free of income tax and super tax.

The defendants were the infant tenant in tail male, and the trustees of the estates for the purposes of the Shrewsbury Estate Acts, who were also trustees for the purposes of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 42.

The Shrewsbury Estate Act, 1843, provides as follows:—

By s. 7 the owner in possession of the estates is empowered by deed to appoint unto and to the use of his wife for life for her jointure (subject to any rentcharge previously limited under this power or under another power thereinafter contained for charging annuities for daughters and younger sons) any annual sum or yearly rentcharge not exceeding the yearly sum of 3000*l.* "clear of all deductions whatsoever for taxes or otherwise" to be charged upon the settled estates therein mentioned and to be paid and payable by equal half-yearly payments on August 1 and February 1 in every year, the first half-yearly payment thereof to be made on such of the said days as shall first happen after the appointor's death.

By s. 9, when the estates would be subject to the payment of more than the yearly sum of 5000*l.* for or in respect of jointures to three or more jointresses they shall not be subject to the actual payment of any greater sum for the second jointure than such a yearly sum as together with the first jointure shall make up 5000*l.*, or if the jointures subsequent to the second jointure do not amount to 1000*l.* then as together with the other jointures shall make up 6000*l.*; and the excess of the second jointure above the yearly sum to which the same is hereby limited shall sink for the benefit of the owner in possession.

By s. 10 the estates shall not at the same time be subject to the actual payment of more than 6000*l.* in respect of jointures, so that if apart from this proviso they would be subject to the actual payment of more than 6000*l.* for jointures the annual sum by the charge whereof that excess shall have been occasioned, or the part thereof forming that excess, shall sink for the benefit of the owner in possession, and the said jointures (subject to the provision in s. 9 for sinking of the second jointure) respectively to have preference or priority of payment according to their order of date.

The Shrewsbury Estate Act, 1862 (25 & 26 Vict. c. 5 (*Private*)), provides as follows :—

By s. 3 any Earl of Shrewsbury may jointure the wife of his heir apparent to any extent not exceeding 1000*l.* a year for her life, and the jointure shall be payable from and after the decease of that heir apparent; but if he survive the appointor, and himself become Earl of Shrewsbury, then the jointure so appointed shall be deemed part of the jointure which he as Earl might appoint to her and the power of jointuring wives created by the 1843 Act is amended, so that it shall have effect for the purposes of this enactment; and jointures appointed in accordance with this enactment shall be deemed to be appointed under that amended power: Provided that this Act shall not extend the limit of 6000*l.* a year fixed by the 1843 Act for the total amount of several jointures in force at any one and the same time.

This power was exercised by a deed of appointment of May 5, 1904, whereby Lady Ingestre (now Lady Winifred Pennoyer), the wife of the late Viscount Ingestre, then heir apparent, was given a jointure of 1000*l.* from her husband's death on January 8, 1915. It was not suggested that this jointure was free of income tax.

This 1000*l.* jointure and the plaintiff's two 1500*l.* jointures were the only jointures now payable.

Luxmoore K.C. and *Dighton Pollock* for the plaintiff. Where the freedom from deductions expressly includes taxes, it includes income tax; secus, if there is no reference to taxes: *Gleadow* v. *Leetham* (1); *In re Bannerman's Estate* (2); *Festing* v. *Taylor* (3); *Lord Lovat* v. *Duchess of Leeds.* (4)

The words "clear of all deductions whatsoever for taxes or otherwise" in the jointure deed are taken straight from the 1843 Act, on the construction of which the point really depends. The amending Act of 1862 is not really material on this point.

Tomlin K.C. and *Ashworth James* for the defendants. If there were no reference to taxes the freedom from deductions would clearly not include income tax: *Lethbridge* v. *Thurlow* (5); *Sadler* v. *Rickards* (6); *Abadam* v. *Abadam* (7); *In re Musgrave* (8); *In re Saillard* (9); *In re Loveless.* (10) But a general reference to taxes in connection with deductions does not necessarily include income tax:

(1) 22 Ch. D. 269, 272.
(2) 21 Ch. D. 105.
(3) (1862) 3 B. & S. 217, 235.
(4) (1862) 2 Dr. & Sm. 62, 72.
(5) (1851) 15 Beav. 334, 339.
(6) (1858) 4 K. & J. 302.
(7) (1864) 33 Beav. 475, 477.
(8) [1916] 2 Ch. 417, 424.
(9) [1917] 2 Ch. 401.
(10) [1918] 2 Ch. 1.

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SHREWSBURY ESTATE ACTS, *In re.* SHREWSBURY *v.* SHREWSBURY.

Wall v. *Wall.* (1) This alone shows that Kay J.'s general dictum in *Gleadow* v. *Leetham* (2) is too sweeping.

In *Festing* v. *Taylor* (3) the rentcharge was expressly devised without any deduction for taxes imposed on the hereditaments or on the rentcharge "or on the Duchess in respect thereof," thereby clearly including the personal liability for income tax. In *Lord Lovat* v. *Duchess of Leeds* (4) the testator directed his trustees to pay all taxes "affecting" the hereditaments given to his wife. It was held that the income tax, though not a charge, was a tax affecting those hereditaments. In *In re Bannerman's Estate* (5) Hall V.-C. purported to follow *Lord Lovat* v. *Duchess of Leeds.* (4) But that was the case of a mere personal annuity not affecting any hereditaments, and the decision is doubtful. In *Turner* v. *Mullineux* (6) there was an express reference to income tax. In *Peareth* v. *Marriott* (7) there was to be no deduction for "legacy tax, or any other matter, cause, or thing whatsoever." In 1861 Wood V.-C. directed the annuity to be paid less income tax. On a subsequent application the Court of Appeal treated the matter as res judicata, but Jessel M.R. expressed the opinion that it was perfectly right, and Cotton L.J., though reluctant to express an opinion without argument, did not differ.

The result of the authorities may be stated in three propositions: (1.) A gift of an annuity free of income tax involves an additional gift of that tax. (2.) The deduction of income tax from an annuity is properly made by the payer as statutory agent for the annuitant, who is still deemed to receive the full annuity. (3.) The additional gift of income tax can only be implied if the words of freedom from deduction refer to income tax expressly or by necessary implication.

In the present case the words may quite well refer to land tax or other impositions falling on the rentcharge as part of the land and forming a real deduction from that rentcharge. There is no necessity to extend them to a mere personal liability like income tax.

(1) (1847) 15 Sim. 513, 520.
(2) 22 Ch. D. 269, 272.
(3) 3 B. & S. 217, 235.
(4) 2 Dr. & Sm. 62, 72.
(5) 21 Ch. D. 105.
(6) (1861) 1 J. & H. 334.
(7) (1882) 22 Ch. D. 182, 192.

Luxmoore K.C. in reply. I admit the general propositions, but the words of s. 7 are clear.

[ASTBURY J. The words are not "clear of all taxes" but "clear of all deductions for taxes." I have to construe a statute, not a will. Must I not assume that the Legislature knew that income tax was not a deduction in the strict sense ?]

The Legislature of 1843 knew that income tax was usually deducted at the source, and cannot have foreseen the subsequent decisions to the effect that it is not technically a deduction.

Sect. 7 impliedly authorizes a charge of 3000*l.* plus the necessary additional sum for income tax. It is true that by s. 10 the charges for jointures must not exceed 6000*l.*, and the provisions for abatement in s. 9 appear somewhat complicated.

If the charges for three or more jointures exceed 5000*l.* the second jointress gets at least the balance of 5000*l.* left after paying the first jointure charge. If the subsequent charges are less than 1000*l.* she may get more. But there is no provision that she is to get less if they exceed 1000*l.*, and any abatement would fall on them under s. 10.

In the present case the first jointure being subject to tax only requires a charge of 1000*l.* The plaintiff's jointures if paid free of the 5*s.* tax require a charge of 4000*l.*, so that the 5000*l.* limit is not exceeded. No doubt under s. 9 the plaintiff's gross charge cannot exceed 4000*l.* unless there is a balance out of the gross 1000*l.* charge at present available for subsequent jointures. But if that latter gross charge is exceeded, the excess will affect the subsequent jointures, not the plaintiff.

In these circumstances there is no difficulty in allowing the plaintiff a gross charge of 4000*l.* or a net annuity of 3000*l.*, whichever is the smaller.

Tomlin K.C. in rejoinder. Sects. 9, 10 clearly assume that there will always be enough for two 3000*l.* jointures or for three of 3000*l.*, 2000*l.* and 1000*l.* But if an extra charge for income tax is added, that would not be so.

If the tax were 10*s.* the first 3000*l.* jointure would require a charge of 6000*l.*, and the limit would be reached.

Or suppose the jointures were 3000*l.*, 2000*l.* and 1000*l.* and the tax 6*s.* 8*d.* Even on the plaintiff's construction of s. 9 the first jointress would have a gross charge of 4500*l.*, leaving only a 500*l.* gross charge for the second and 1000*l.* gross charge for the third, the result being that the third jointure gets twice the amount of the second. If the tax were 8*s.* the first jointure would require a gross charge of 5000*l.* and the second would be wiped out altogether, leaving the third with a gross charge of 1000*l.*

These whimsical results can never have been in the contemplation of the Legislature, who were clearly speaking of fixed annual jointures, and not sums varying, if need be, to a vanishing point with changes of income tax. The 1843 statute construed as a whole will therefore not bear the plaintiff's construction to the effect that "deductions" include income tax.

ASTBURY J. [after stating the facts]. Numerous authorities have been cited which make it impossible for me to determine the meaning of the words "clear of all deductions whatsoever for taxes or otherwise" in the 1843 Act except in accordance with certain principles laid down in those authorities. In 1843 the income tax was very trifling and the other taxes, if any, to which these jointure rentcharges could have been subject would have been land tax and possibly local and other assessments. The plaintiff however contends that on the true construction of the statute she is entitled not only to payment of her jointure rentcharges, but also to have made good to her out of the estates both the amount of income tax payable in respect of that addition to her income, and also the amount of super tax which she, having regard to her income generally, is liable to pay.

The case has, up to the present, been argued solely on the income tax point. If the plaintiff succeeds upon this the super tax matter will have to be decided, but if she fails then she must a fortiori fail with regard to super tax. The plaintiff admits, in accordance with a long series of authorities, that the mere gift of an annuity "free from all deductions whatsoever" or the gift of "a clear annual sum free from all deductions" or a gift with merely similar expressions does not entitle the annuitant to have her income tax made good to her out of the property paying the annuity, but contends that if in the words providing for freedom from deduction there is any reference to tax, the case is different.

The true view, in my opinion, is that where in a will or other document an annual sum is given free from certain impositions, it depends entirely upon the language and surroundings of the document what those impositions include. The mere reference to taxes in a sentence providing that an annual sum is to be paid free from all deductions does not necessarily or at all imply that it must be paid free of income tax. That may or may not be so according to the context. It must be remembered that an annuitant's liability to pay income tax is not a liability to pay out of the annuity itself, but because of the receipt of that annuity. It is also plain that the payer of an annuity is bound by law to deduct the income tax payable by the annuitant in respect of each instalment. But that deduction is a payment made by the payer as agent for and solely on the annuitant's account, and notwithstanding the deduction a payment of the full amount is in law deemed to have been made to the annuitant. Now a tax on an annuity which the Government takes as part of the annuity itself, such as land tax, is entirely different from a tax which the Government takes on the total income of the annuitant. The latter liability is personal, and is assessed not in accordance with or in consequence merely of the payment of the annuity, but having regard to the general income of the annuitant. In other words income tax is not a charge on or a deduction from the annuity itself, but a personal liability of the annuitant.

Again it is important to ascertain whether s. 9 throws any light upon the character of the payments contemplated by s. 7. In my opinion the draftsman in framing s. 9 thought he was dealing with fixed definite sums that the annuitants would respectively receive in each year. If there is a tax deductible as such from the annuity, s. 7 provides that the annuity is to be paid free from that deduction, and the annuitant will in consequence continue to receive the one definite sum of her jointure. If this be so, s. 9 is intelligible and easy to construe. If, however, the effect of ss. 7 and 9 is that the estates are to bear not only an income tax never dreamt of in 1843, but a super tax, which had never been thought of either, then the effect in certain events of the provisions of s. 9 are, to say the least of it, startling. The jointresses in that case would no longer receive fixed and certain sums each year in respect of their jointures, but they would have to receive by way of additional annuity not only the income tax strictly so called but also the super tax, which would vary according to the circumstances of each jointress, and it is quite easy to see that this provision, which in s. 9 seems to have been inserted for the benefit of the second jointress in the case of there being more than two might, if that be the true construction, result in the second jointress getting less than the third and in certain events getting nothing at all. It is true that I ought not to place too much reliance on this circumstance, especially as the heavy income tax and super tax now in operation were probably not in the contemplation of those who drew this Act; but I think some weight ought to be given to it.

Again, apart altogether from authority, what is the meaning of "clear of all deductions whatsoever for taxes or otherwise"? Does it mean "clear of all deductions whatsoever from the annual sum itself in respect of taxes or otherwise," or does it mean "clear of all deductions whatsoever including deductions only made by way of machinery for the convenience of the annuitant and in no legal sense at all deductions from the annuity"?

In my opinion the former is the true meaning, and the annuity is only to be paid clear of all deductions from the annuity itself, whether for taxes or for other matters. If that be the true construction there is really nothing further to decide.

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With regard to the authorities, the plaintiff bases her contention very largely upon a sub-division of cases enunciated by Kay J. in *Gleadow* v. *Leetham.* (1) In that case a testator declared that his trustees should stand possessed of his residuary estate, and directed them out of the income to pay his wife "the clear yearly sum of 600*l.*" for life if she should remain his widow, but if she should marry again an annuity of 100*l.* in lieu of the annuity of 600*l.*, "the said annuities of 600*l.* and 100*l.*, as the case may be, to be paid free from all deductions and abatements whatsoever." The learned judge held that the annuity was not given free from income tax, and although the portion of his judgment relied upon by the present plaintiff is really obiter, so much is said to turn upon it that I think it is well to examine it.

Kay J. found that the authorities on the subject he was dealing with fell roughly into two classes: one where annual sums were given free of tax, and the other where they were given free from deduction without any reference to taxes. The case that he had to deal with was the latter, and it was obviously unnecessary for him to examine in any very great detail the cases falling into the first category. He said (2) "There are two classes of cases in reference to this question,—one where by will a testator gives an annuity, and then directs that it shall be free from all deductions in respect of any taxes, and of this class of cases the principal examples are *Festing* v. *Taylor* (3), a decision of the Exchequer Chamber; *Lord Lovat* v. *Duchess of Leeds* (4); and *In re Bannerman's Estate.* (5) In all these cases the word 'deduction' was construed by the word 'taxes' which was associated with it, and it seems to have been held that the annuity was to be paid free of income tax. The other class of cases is where the words are 'to be paid without any deduction' or 'free from legacy duty and other deductions,' and in those cases the income tax was held to be payable by the annuitants, because income tax, as it seems to have been stated over and over again, is not properly speaking a deduction, and there must be something else besides the word 'deduction' to make the gift of an annuity free of income tax. It was only where the word 'deduction' was coupled with the word 'taxes,' or there was some other indication that it was meant to include income tax, that it was so construed." Then the learned judge referred to a number of authorities falling into the second class. Towards the end of his judgment he said (1): "I confess that but for the authorities referred to I should have felt a little more difficulty than I do, because the annuity being given by the testator to his wife, I do not see what the direction was aimed at if not the income tax." But, notwithstanding that, he felt himself bound by the authorities, and he came to the conclusion I have stated.

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(1) 22 Ch. D. 269.

(2) 22 Ch. D. 271.

(3) 3 B. & S. 217, 235.

(4) 2 Dr. & Sm. 62.

(5) 21 Ch. D. 105.

The plaintiff contends that this judgment means that if an annuity is given free from all deductions including the word "tax" used in a series of expressions or at all, then income tax must be deemed to be a deduction within the meaning of the direction. I do not think Kay J. meant to say anything of the kind. It was not necessary for him to discuss why and to what extent a mere reference to tax carried with it the result in question. What he really decided was that where there was a mere direction to pay free from deduction without any reference to taxes or anything to lead one to suppose that income tax was intended to be included as a deduction, then the income tax was payable by the annuitant.

I do not propose to read or refer to any of the cases where there is no reference to taxes, as it is perfectly plain that a direction to pay a clear annual sum free from all deductions whatsoever will not, for reasons explained over and over again, charge the income tax on the estate.

With regard to the cases where a tax is mentioned. In *In re Bannerman's Estate* (2) a testator gave his wife annuities or clear yearly sums for her life "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing, whatsoever,"

(1) 22 Ch. D. 274. (2) 21 Ch. D. 105.

and directed the trustees, and so on. It was held that the widow was entitled to be paid her annuities in full free from any deduction, including income tax. I read this case first, although it is not in order of date, because it is relied upon very strongly by the plaintiff, and the language which had to be construed was really very similar to that in the present case. Hall V.-C., after conceding that income tax is not a deduction but a payment to be made by the annuitant, said (1) that in the case of the will he was dealing with there was no tax which at its date (1846) could be indicated as having been meant by the testator except income tax. I think it was very largely upon that ground, coupled with the fullness of expression as to the freedom from deduction, that he came to the conclusion he did, but it is to be observed that the learned judge (2) seemed conscious of the fact that his decision was not quite in accordance with the earlier decisions, which were opposed to his view, but having regard to the peculiar circumstances which he indicates, he came to the conclusion which I have stated. Whether this decision is quite in accordance with the trend of authority up to that time I have some doubt.

In *Wall* v. *Wall* (3) the testator gave his wife an annuity or clear yearly rentcharge of 1800*l.* clear of all taxes and deductions. Held that the annuity was not free from income tax. If Kay J.'s division of cases is to be taken with absolute strictness, it is quite plain that this authority is opposed to it. Shadwell V.-C. in giving judgment said: "With respect to the question about the payment of the widow's annuity free from property-tax. I have looked at s. 102 of the Property-Tax Act, and it is quite plain, from the language of that section, that the thing that is given is the thing that is to pay the tax. The words of the section cannot be so strained as to mean that, whether the property-tax be increased or decreased at any future time during the continuance of the annuity, the annuitant is to receive, every year, a sum of a given amount."

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(1) 21 Ch. D. 109.

(2) 21 Ch. D. 110.

(3) 15 Sim. 513, 520.

That seems to me to result in this, that if the freedom from deduction is coupled with a freedom from tax, that then it is a question in each case whether it is to be freedom from all tax or only freedom from such taxes as may legally and strictly be said to be deductions.

In *Turner* v. *Mullineux* (1) a testator gave three annuities—the first "free from income or property-tax or any other deduction"; the second "free from all deductions"; the third "free from deduction." Wood V.-C. held that all the annuities were free from income tax, and for the reason which is perfectly plain in his short judgment. He said: "This Court always holds that income-tax is not a deduction; but here the testator in the first instance speaks of 'income, or property-tax and all other deductions,' which explains that he understands the word 'deduction' as extending to income-tax. When he afterwards goes on to give other annuities, he shortens his form of expression, first to 'free from all deductions' and then to 'free from deduction.' The true way of construing the will is, not to interpret the last gift and carry back that construction of the word 'deduction' to the earlier clauses, but to read the word throughout in the sense in which it is first used."

That is an instance of a construction which frees the annuitant from income tax, or rather which gives him or her an equivalent amount per annum to the income tax, payable either because it is expressly so given or because there is a necessary implication to that effect from the language used.

In *Peareth* v. *Marriott* (2) the testator "directed trustees to stand possessed of residuary real and personal estate upon trust to pay thereout to his wife, during her life, such an annual sum as, together with the income of a settled fund of 10,000*l.*, should produce to her 'a clear annual income of 1500*l.*'"—and he declared that no deduction should be made for "the legacy tax or any other matter, cause, or thing whatsoever." That is a case where tax is referred to in connection with the word "deduction," but where it did not include income tax because it was expressly limited to some-

(1) 1 J. & H. 334.

(2) 22 Ch. D. 182, 192.

thing different. The decision really does not bear on what I have to decide, as the Court of Appeal held, differing from Bacon V.-C., that the matter was res judicata having regard to an earlier decision of Wood V.-C., who in 1861 had held that under this will the annuitant had no right to receive the amount of her income tax, and the case is only useful because Jessel M.R. expressed his concurrence in that view.

I cannot help feeling that there is or may be some difference in construing words like these in an Act of Parliament or in a will. A latitude of interpretation is given in construing wills which hardly applies to construing Acts of Parliament. I am clearly bound by authorities which say that income tax is not strictly a deduction within the meaning of words like these. It may very well be that under a trust gift in a will the Court may come to the conclusion, having regard to the context and framework generally, that the testator in any particular case intended the word "deduction" to cover such things as income tax. But in a case of strict legal settlement provided for by statute, the words "deduction for taxes" ought in my judgment to be read primarily in their strict legal sense. I think that s. 7 means that there shall be no deduction which is in truth a deduction from the annual sums payable, whether that deduction is for taxes or otherwise; but I do not think that it means free from such impositions by reason of taxes which are not legally deductions at all.

On the strength of the authorities generally the defendants have submitted three propositions: (1.) A gift of an annuity free of income tax involves an additional gift of that tax. (2.) Where it is the duty of the payer of an annuity to make an income tax deduction he makes it as the statutory agent of the annuitant, and the annuitant, notwithstanding that deduction, is deemed in law to receive the full annuity. (3.) To extract from any given collocation of words a gift of income tax by reference to a provision as to deductions, one must find an express reference to income tax as such or a reference to it by necessary implication. The mere reference to taxes simpliciter is not of necessity sufficient.

ASTBURY J.

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SHREWSBURY ESTATE ACTS, *In re.*

SHREWSBURY *v.* SHREWSBURY.

Those propositions are admittedly sound and undisputed, but the plaintiff has attempted to show that here there is a sufficient reference to taxes to include income tax. In my judgment that is not so, and for these reasons there must be a declaration that upon the true construction of the Shrewsbury Estate Acts and the jointure deed the plaintiff's jointures are not payable free of income tax.

Solicitors: *Nicholson, Freeland & Shepherd; Williams & James.*

G. R. A.

ROMER J.

1923

Feb. 15.

In re EARL OF LONDESBOROUGH.

SPICER *v.* EARL OF LONDESBOROUGH.

[1922. L. 2734.]

Settlement—Trusts of Rents and Profits during Life of Tenant for Life—Trustees unimpeachable for Waste—Agreement for Sale of Timber—Sale of Land, subject to Agreement—Timber cut at Date of Sale of Land—Timber uncut—Proceeds of Sale of Timber belong to Tenant for Life.

By a settlement certain hereditaments were settled to the use of certain trustees during the life of A. B. without impeachment of waste upon the trusts, and with and subject to the powers thereinafter declared, with remainders as therein mentioned, and it was declared that the hereditaments were thereby limited to the trustees upon trust, during the life of A. B., that if at the time of such limitation taking effect in possession A. B. should not be or have been bankrupt the trustees should allow him to enter into and remain in the possession or receipt of the rents and profits of the settled estates during his life or until he should become bankrupt. By an agreement, dated December 7, 1920, A. B. agreed to sell all the timber standing in certain portions of the settled estates. On January 18, 1922, a contract was entered into by A. B. for sale of part of the settled land, subject to the agreement of December 7, 1920, and on March 14, 1922, such land was conveyed to the purchaser, subject to the agreement:—

Held, that the proceeds of sale of the timber belonged to A. B.

At the date of the contract for the sale of land and at the date of the conveyance, part of the timber, to the value of about 500*l.*, remained uncut.

Held, applying *Liford's Case* (1614) 11 Rep. 46b, that although as regards the purchaser of the land the timber was divided from the freehold, yet nevertheless it remained part of the inheritance and subject to the

ROMER J.

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Earl of Londesborough, *In re.* Spicer *v.* Earl of Londesborough.

limitations of the settlement; that, accordingly, it did not vest in A. B., but being however part of the inheritance and still remaining subject to the limitations of the settlement, on severance it became the property of A. B., and that, therefore, the 500*l.* belonged to him.

By a settlement, dated May 28, 1914, certain hereditaments were settled to the use of the third Earl of Londesborough for life, with remainder to his sons in tail male, with remainder to the use of certain trustees, their executors, administrators and assigns during the life of the fourth earl without impeachment of waste upon the trusts, and with and subject to the powers and provisions thereinafter declared and contained of and concerning the same, with remainders as therein mentioned, and it was thereby declared that the said hereditaments were thereby limited to the trustees upon trust, during the life of the fourth earl, that if at the time of such limitation taking effect in possession the fourth earl should not be or have been bankrupt, and should not have alienated or charged or affected to alienate or charge the estate or interest thereby given to him in the settled estates, and if no other event should have happened whereby such estate or interest or any part thereof would, if belonging absolutely to him, have become vested in or charged in favour of some other person or persons the trustees should allow the fourth earl to enter into and remain in the possession or receipt of the rents and profits of the settled estates during his life or until he should become bankrupt or alienate or charge or affect to alienate or charge his said estate or interest in the settled estates or some part thereof, or until some other event should happen whereby such estate or interest or some part thereof would if belonging absolutely to him become vested in or charged in favour of some other person or persons, and it was thereby declared that in the event of the failure or determination of the said estate or interest under the trusts lastly thereinbefore declared, all the powers annexed thereto or thereby given to a tenant for life should continue to be exercisable by him notwithstanding such failure or determination, and it was thereby declared that the trustees should after the failure or determination during the lifetime of the fourth earl of his life estate or interest enter into possession or receipt of the rents and profits of the settled estates, and manage or superintend the management of the settled estates with the same powers in that behalf as if they or he were in such possession or receipt during the minority of an infant tenant in tail male, and should out of the rents and profits of the settled estates make such payments as therein mentioned with power to delegate any of the powers of management lastly thereinbefore contained, and to pay the net rents and profits to or apply the same for the maintenance or personal support or benefit of all or any one or more of the persons, including the fourth earl, therein mentioned.

The third earl died on September 12, 1920, and thereupon the present earl succeeded to the title as fourth earl, and to the possession or receipt of the rents and profits of the settled estates under the trusts declared concerning the same.

By an agreement, dated December 7, 1920, the present earl agreed to sell all the growing timber and poles standing in certain portions of the settled estates, and it was provided that the whole of the timber and poles should be felled and the woods cleared by the purchaser on or before December 1, 1922. On January 18, 1922, a contract was entered into by the present earl for the sale of part of the settled land, subject to the agreement of December 7, 1920, and on March 14, 1922, such land was conveyed to the purchaser, subject to the agreement. At the date of the contract for sale the timber and poles sold under the agreement had not been completely cut out. The value of the uncut timber was about 500*l.*, and no further cutting took place between January 18 and March 14, 1922.

This summons was taken out by the trustees of the settlement, and it asked whether the proceeds of sale of the timber and poles comprised in the agreement of December 7, 1920, ought to be held by the plaintiffs as capital moneys arising under the Settled Land Acts from the hereditaments comprised in the settlement, or whether they were payable to the present earl as the person beneficially entitled to the rents and profits of the hereditaments, or how otherwise they ought to be held or applied.

Under the settlement the trustees were directed, in certain events, to raise the sum of 100,000*l.* with interest as therein mentioned for the benefit of the Marchioness of Carisbrooke.

C. G. O. Bridgeman for the plaintiffs.

Errington for the tenant for life. The proceeds of sale of the timber cut at the date of the sale of the land belong to the fourth earl. The estate is limited to the trustees for the life of the fourth earl without impeachment of waste. The proceeds of sale, therefore, must go the same way as if the fourth earl, the tenant for life, were unimpeachable for waste. *Wolf* v. *Hill* (1) was a very similar case to the present, and it was held there that the tenant for life was entitled to the proceeds of sale of timber cut down by him previous to the sale of the land.

With regard to the 500*l.*, it must be remembered that the tenant for life can give authority to another person to cut down the timber on the estate. Here the fourth earl gave such authority to the purchaser of the timber, and then sold the land, the purchaser of the land giving nothing for the timber sold. The fourth earl could have put off the sale of the land till all the timber had been removed. There is nothing directly bearing on this point in the Settled Land Act, 1882 (45 & 46 Vict. c. 38), but s. 3 provides that a tenant for life "(i.) May sell the settled land, or any part thereof. . . . ." It is obvious that the fourth earl granted an irrevocable licence to the purchaser of the timber.

Franey for the Marchioness of Carisbrooke, who was appointed to represent the inheritance. The point that differentiates this case from others is that here the estate is given to the trustees without impeachment of waste. There is no case in which the privilege is given to one person and enures to another. In *Plymouth* v. *Archer* (2) it was held that a tenant for life sans waste could not cut down timber on the land to be sold. In *Lord Lovat* v. *Duchess of Leeds*

(1) (1806) 2 Swanst. 149n.

(2) (1782) 1 Bro. C. C. 159.

(No. 2) (1) the tenant for life was unimpeachable for waste. One reason why the privilege is given to the trustees here is that they might be in a position to cut the timber. They ought to exercise their power so as to help in reducing the charge on the inheritance: *Kekewich* v. *Marker.* (2)

The question as to who is entitled to the 500*l.* is also dealt with in *Kekewich* v. *Marker.* (3) That question was decided in Coke's time: *Liford's Case.* (4) *Wolf* v. *Hill* (5) is no authority on this point. In *Bridges* v. *Stephens* (6) a tenant entitled to a life interest in a term of years, unimpeachable for waste, was held to be entitled to cut the timber for her own benefit. That case, however, does not decide this point. A tenant for life has no property in trees standing on the estate, and he cannot pass the property in them: *In re Llewellin* (7); *Cholmeley* v. *Paxton* (8); *Doran* v. *Wiltshire.* (9)

Errington in reply. *Bridges* v. *Stephens* (6) is a different case to the present.

With regard to the timber standing on the land at the date of the sale, a proper licence had already been given by the tenant for life to cut and sever it. The reversioner cannot claim part of the money that was given for the licence. The tenant for life is the only person who can claim this 500*l.*

ROMER J. The first question which I have to determine is the question whether the proceeds of sale of the timber cut at the date of the sale of the land belong to the fourth earl or form part of the inheritance. The trustees in whom the legal interest during the life of the fourth earl is vested are expressly stated to be unimpeachable for waste. If therefore they cut and sold timber during the life of the fourth earl the proceeds of sale of that timber would have formed part of the rents and profits of the estate in their hands. In my opinion the fourth earl while in possession, although not stated expressly to be unimpeachable for waste, is entitled to receive the same rents and profits as the trustees would have been entitled to receive if they had been in possession. This is not a case where a term of years is limited to trustees without impeachment of waste, and the trustees are directed to stand possessed of the legal term for one person for life, with remainders over. Then it would not follow that the proceeds of sale of timber would belong to the equitable tenant for life rather than to the persons equitably entitled to the term in remainder. What we have here is a direction to the trustees as to the way in which the rents and profits are to be applied during the life of the fourth earl. Throughout, the trusts declared are trusts of the "rents and profits." As between the trustees, as the legal owners of an estate for the life of the fourth earl, and the inheritance the trustees are entitled to the proceeds of sale of the timber as part of the rents and profits, and if the fourth earl is not entitled to these proceeds as "rents and profits," it would seem that no trusts have been declared of them at all. In my judgment however the fourth earl is so entitled as being the person who before any forfeiture has occurred is in equity entitled to everything accruing to the trustees as rents and profits.

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(1) (1862) 2 Dr. & Sm. 75.
(2) (1851) 3 Mac. & G. 311, 334.
(3) 3 Mac. & G. 311, 333.
(4) 11 Rep. 46b, 50a.
(5) 2 Swanst. 149n.
(6) (1816) 2 Swanst. 150n.
(7) (1887) 37 Ch. D. 317.
(8) (1825) 3 Bing. 207.
(9) (1792) 3 Swanst. 699.

One authority that supports the view which I have taken on this question is *Wolf* v. *Hill.* (1) In that case land had been limited to trustees during the joint lives of Walter Hill and Clarissa his wife without impeachment of waste in trust that the trustees should, after making certain payments out of the rents and profits, pay the residue and surplus of the rents and profits to W. Hill and his assigns, or authorize him and them to receive and take the same during the natural lives of himself and the said Clarissa to and for his and their own use and benefit, with remainder to W. Hill and his assigns for his life without impeachment of waste, with remainder over. W. Hill sold certain timber on the estate for 270*l.* Subsequently the estate was sold, and the timber still standing on the land was valued at 350*l.* It was held to be clear that W. Hill was entitled to the 270*l.*, but was not entitled to the 350*l.*, the value of the timber which had not been cut. In so holding Sir William Grant must have proceeded on the footing that the trustees being unimpeachable for waste were entitled to the proceeds of sale of the timber as part of the rents and profits, and that such proceeds were payable to W. Hill by virtue of the trust, to pay to him the balance of the rents and profits.

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(1) 2 Swanst. 149n.

I was also referred to *Bridges* v. *Stephens.* (1) That is a case that is well worth comparing with *Wolf* v. *Hill.* (2) There the trustees of a term of years without impeachment of waste held the term in trust for Jemima Bridges for life, then in trust for Edward Bridges for life, then in trust for his wife, Caroline, for life, and on the death of the survivor of them in trust for the children of the marriage, and in default in trust for Edward Bridges absolutely. Edward Bridges died intestate and without issue. Caroline, as his administratrix, thereupon agreed to sell the reversion expectant on the death of the survivor of herself and Jemima Bridges. After the death of Jemima the purchasers of the reversion filed a bill to restrain Caroline from selling and disposing of the timber. The Lord Chancellor refused the injunction, treating her as a person not unimpeachable for waste. In that case it was the term of years which was settled upon trust for persons for life with remainders over. It was not a trust under which the rents and profits were held in trust for the benefit of various persons in succession. That seems to distinguish the case from the present case and *Wolf* v. *Hill.* (2)

The second point is as to whether the 500*l.*, which is the value of the timber remaining uncut at the date of the sale of the land, goes also to the fourth earl. In my opinion it stands on no different footing from the timber then cut, and it goes to the fourth earl. The land was bought subject to, though not with the benefit of, the agreement for the sale of the timber. The purchasers therefore bought the land without the timber. Now either that sale was bad as not being within the powers of the tenant for life, or the sale of the land without the timber was good. Supposing that the sale was bad, the result would be that the land still remained subject to the limitations of the settlement. In that case the 500*l.* would stand on precisely the same footing as the other proceeds with which I have already dealt. If on the other hand the sale of the land was a good one then it becomes necessary to consider the effect of the reservation of the timber standing on the land that was sold.

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(1) 2 Swanst. 150n.

(2) 2 Swanst. 149n.

In this connection I was referred to *Liford's Case.* (1) In that case the owner of certain tenements had leased them to lessees for lives excepting the timber trees, and he subsequently covenanted to stand seised of the demised tenements to the use of his son R. in tail who, during the existence of the lease, entered upon the tenements and sold some of the timber. The question that the Court had to determine was what was the effect of the exception of the timber from the demise, and it was resolved that the timber did not belong to the lessor but remained parcel of the inheritance and passed by the covenant to stand seised, though the soil on which the trees were growing was not itself excepted from the demise, but only sufficient nutriment for the growth of the tree. It was further resolved that, although fictione juris quoad the lessee the tree was divided from the freehold, yet in fact and in truth it remained parcel of the lessor's inheritance. Applying that case to the present one, it follows that quoad the purchaser of the land the timber was divided from the freehold, yet nevertheless it remained part of the inheritance and subject to the limitations of the settlement. The timber accordingly did not, by virtue of the reservation, vest in the fourth earl before severance. Being however part of the inheritance, and still remaining subject to the limitations of the settlement, such timber on severance became the property of the fourth earl in accordance with my decision upon the first point. In either event therefore the 500*l.* belongs in my judgment to the fourth earl, and it is not necessary to determine whether the sale by him with the reservation of the timber was within his competence as tenant for life.

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(1) 11 Rep. 46b.

Solicitors: *Royds, Rawstorne & Co.*

P. J. B.

ASTBURY J.
1923
March 14, 16, 27.

In re NEUBURGER'S SETTLEMENT.

FORESHEW *v.* PUBLIC TRUSTEE.

[1923. N. 23.]

Alien—Infants—German Nationals—Covenant to pay Annuity for their Benefit—Maintenance—Contingent Interests—Statutory Charge—Enforceability of Covenant—Treaty of Peace, 1919, *Art.* 299*—Treaty of Peace Order,* 1919, *s.* 1, *sub-s. xvi.*

Under the trusts of a marriage settlement of 1903 and in the events that had happened certain infant children, German nationals, were on January 10, 1920, when the Peace Treaty came into operation, entitled contingently on attaining twenty-one or marrying to an annuity of 150*l.* a year. If neither infant attained a vested interest the annuity passed to the husband, also a German national.

The annuity was secured by the covenant of the wife's parents with the trustees, all British subjects, and was payable during the lives of the surviving covenantor and the surviving child, but the trustees were not to be liable for any loss occasioned by their neglect to enforce the covenant.

The infants' contingent title accrued in possession on the wife's death on July 17, 1918, but the trustees had not enforced the payment of any instalment since then.

The Custodian having claimed the annuity, the trustees submitted the matter to the Court. The Custodian had not obtained a vesting order:—

Held, that both the arrears and the contingent future instalments payable after January 10, 1920, were property rights or interests within the meaning of the Peace Treaty Order, 1919, s. 1, sub-s. xvi., and, notwithstanding the infants' personal incapacity, were caught by the charge.

View of Russell J., Lord Sterndale M.R., and Warrington L.J. in *In re Rush* [1922] 1 Ch. 302, 311; [1923] 1 Ch. 56, 62, 64 on the infancy point adopted in preference to the contrary view of Younger L.J. [1923] 1 Ch. 68, 69, 72, 73.

Held, also, that as the contingent interests of the infants, and obviously that of the husband, were caught by the charge, and the covenant was still an enforceable covenant, it was the trustees' duty to enforce it on behalf of the Custodian as their cestui que trust, and they were not entitled to apply any part of the annuity for the infants' maintenance under s. 43 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41).

ORIGINATING SUMMONS.

By an antenuptial settlement dated April 27, 1903, and made between the husband, a German subject, of the first part, the wife, a British subject, of the second part, the wife's parents, British subjects, of the third part, and the trustees, British subjects, of the fourth part, the husband and wife covenanted with the trustees to assure the wife's after-acquired property to the trustees upon trust to pay the income to the wife for life for her separate use without power of anticipation; and after her death if her husband survived her and she had by deed or will so directed to pay the income or any part thereof therein named to the husband for life or for any shorter period therein provided; and subject thereto upon trust to stand possessed of the trust premises and the income in trust for the children or remoter issue of the marriage in such shares and manner as the wife should by deed or will appoint; and in default of appointment for the children who being sons should attain the age of twenty-one or being daughters should attain that age or marry.

In default of such children the ultimate trusts of the trust premises and the income thereof were for the wife's appointees by deed or will, and in default of appointment for the wife if she survived her husband, or her statutory next of kin, excluding her husband and issue, if she predeceased him.

By the same settlement the wife's parents jointly and severally covenanted with the trustees that during the joint lives of the parents and the life of the survivor they and their survivor (if and so long as the wife or any issue of the marriage were living) would pay the trustees the yearly sum of 150*l.* commencing from the marriage by equal quarterly payments on the usual quarter days, but to be deemed to accrue from day to day; upon trust to pay the same to the wife for life for her separate use without power of anticipation. And after her death upon trust to apply the same as if it were

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income arising after the wife's death of the wife's after-acquired property brought into settlement as aforesaid, and subject to the like power of appointment in favour of issue of the marriage, "but without any power to her to direct payment thereof or of any part thereof" to her husband. It was provided that the trustees should not be liable for any loss occasioned by their omission or neglect to enforce the after-acquired property covenant or the annuity covenant. It was also provided that the settlement should be construed by English law.

The marriage was duly solemnised at Oxford on April 28, 1903. The husband and wife resided in Germany, where the husband was domiciled, and their two children, still infants, were born there.

The wife died on July 17, 1918, having by her German will dated February 25, 1904, appointed her husband her heir, but not having made any appointment to her children, who still resided with their father in Germany.

The annuity was duly paid through the trustees to the wife up to March 31, 1914. During the war no payments were made and the arrears at her death were 644*l.* On October 3, 1922, these arrears were paid by the wife's parents to the Controller of the Clearing Office, who on June 1, 1922, had taken out administration to the wife's estate limited to that amount. No vesting order had been made.

Expert evidence was given to the effect that the wife's German will was valid and exercised the general power of appointment subject to the children's interest.

On January 5, 1923, the trustees issued this summons against the Public Trustee, who claimed the annuity as the Custodian of Enemy Property, the infant children, and the wife's parents to determine: (*a*) Whether having regard to the Peace Treaty and the Peace Treaty Order, 1919, the parents' joint and several covenants for the payment of the yearly sum of 150*l.* had become unenforceable, and, if so, from what date? (*b*) If enforceable, whether the trustees were justified in applying the said yearly sum for the maintenance, education or benefit of the infants, whether residing in England or Germany? (*c*) If not so justified, whether the trustees were justified in refraining from enforcing the covenants, and, if not, to whom the said yearly sum, including the arrears since the wife's death, ought to be paid?

Leeke for the trustees.

Nicholson Combe for the infants. This is not a testamentary annuity, as in *In re Biedermann* (1) or *Wroughton* v. *Colquhoun.* (2) That would be a fund in the nature of a legacy on which legacy duty would be payable. This is merely a covenant to pay instalments on a double contingency. A covenantor must be alive. A child must be alive. Otherwise no instalment is payable. Again no estate duty is payable on the cesser arising on the surviving covenantor's death: Hanson on Death Duties, 6th ed., p. 92.

Now bearing these distinctions in mind, it is in the first place clear that the future contingent instalments payable after January 10, 1920, when the Peace Treaty came into operation, did not constitute a fund, and they were obviously not debts: *In re Hargreaves.* (3) Surely they were not "property rights and interests" caught by the charge in the Peace Treaty Order, 1919, s. 1, sub-s. xvi.

[ASTBURY J. Apart from infancy these future instalments would have been assignable interests.]

Like any other future property, possibilities, or expectancies they would have been assignable for value: *Tailby* v. *Official Receiver.* (4) But if the Peace Treaty Order catches this kind of contingent interest it would catch a mere spes successionis.

Secondly, the charge was only intended to affect the property rights or interests of persons sui juris. This was the view of Younger L.J. in *In re Rush.* (5)

Thirdly, the trustees have a discretionary power of maintenance under the Conveyancing Act, 1881, s. 43. That maintenance is not property: *In re Coleman.* (6) The accumulations of income not so applied still form part of the annuity which the wife is expressly debarred from appointing to her husband. The second and third points apply to the arrears due on January 10, 1920. The first point does not of course apply to them.

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(1) [1922] 2 Ch. 771.
(2) (1847) 1 De G. & Sm. 357.
(3) (1890) 44 Ch. D. 236, 239.
(4) (1888) 13 App. Cas. 523, 543.
(5) [1923] 1 Ch. 56, 68, 69, 72, 73.
(6) (1888) 39 Ch. D. 443, 451.

J. E. Harman for the wife's parents. On the declaration of war this covenant became a covenant for the benefit of enemies, and was therefore dissolved by the Peace Treaty, art. 299. In any case the trustees are not bound to enforce it.

Gavin Simonds for the Custodian. The covenantors and covenantees were both British subjects, so that art. 299 is inapplicable.

The infants' contingent instalments, though not debts, were clearly property rights or interests within the Peace Treaty Order, 1919, s. 1, sub-s. xvi. In *In re Rush* (1) Russell J. thought that the charge attached notwithstanding personal incapacity, and in the Court of Appeal (2) Lord Sterndale M.R. and Warrington L.J. took the same view. The observations of Younger L.J. (3) to the contrary are only obiter, and cannot be treated as an authority.

The infants' instalments being caught there can be no maintenance out of them.

If neither infant attains a vested interest the whole fund passes to the husband as appointee under the general power. He is only excluded from taking a life interest in front of his children under the special power. The general power is unaffected. Quacunque via the Custodian is entitled to the entire annuity, and the trustees ought to enforce the payment. If they wish they can accumulate the income and pay or transfer the accumulations half yearly to the joint account of themselves and the Custodian, until it is ascertained whether the infants or the husband become entitled.

ASTBURY J. [after stating the facts:] The question is whether the contingent interests of the two infants are caught by the charge in the Peace Treaty Order, 1919, s. 1, sub-s. xvi., and whether the wife has exercised her general power of appointment, which will come into operation in default of either of her children attaining a vested interest. She has made a will, which an expert on German law states is a sufficient document to exercise her general power of appointment under her marriage settlement. That power was exercised in favour of her husband. At the present time therefore the two children are contingently interested in the trust fund to be provided by way of these annual payments, and the husband is interested as appointee under the general power in the event of neither child living to attain a vested interest.

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(1) [1922] 1 Ch. 302, 311.

(2) [1923] 1 Ch. 56, 62, 64.

(3) [1923] 1 Ch. 68, 69, 72, 73.

The infants contend that the husband is excluded from taking any part of this annuity under the general power. After the wife's death the annuity is to be applied as if it were income of the wife's after-acquired property previously settled and subject to the like power of appointment in favour of issue, " but without any power to her to direct payment thereof or of any part thereof " to her husband. I think that only excludes the wife's right to appoint a life interest in the annuity to her husband in front of her children. I do not think that it in any way affects her general power in default of issue, and I so hold.

The question is whether the annuity covenants have become unenforceable and whether the charge in the Peace Treaty Order catches the annuity. A very long and elaborate argument has been addressed to me for the purpose of showing that on January 10, 1920, when the Peace Treaty came into operation, these children had no property, right or interest of any sort or kind in the future instalments which could be caught by the charge. I do not propose at this hour to go through the argument, but it seems to me perfectly plain that there was a trust fund to be fed by annual payments of 150*l.* a year in which at the date in question these children had a plain right and interest. Had they been sui juris that interest would have been an assignable interest. It is therefore caught by the charge. The husband's contingent interest in remainder, he being also a German national, was similarly caught. That being so, the covenant is still enforceable, the trustees have no longer any right under the Conveyancing

Act, 1881, or otherwise to give maintenance to these children, nor have they any right to refrain from enforcing this covenant. The Custodian is now their beneficiary, and they must do their duty accordingly.

The infants contended that infants' property is not caught by the charge. They relied on certain dicta of Younger L.J. in the Court of Appeal in *In re Rush* (1) to that effect. In the Court below however Russell J. (2) was not only of opinion that infants' property was caught by the charge, but he expressed himself strongly, by way of illustration, that that must be so, and the judgments of Lord Sterndale M.R. and Warrington L.J. (3) I think plainly point, having regard to the view expressed by Russell J., to the fact that they were of that opinion. That being so, I am bound to accept the view stated by Russell J., and, as I think, concurred in by the majority of the Court of Appeal, and perhaps it is unnecessary for me to say, as is the fact, that I think that view right. I therefore hold that the whole property in this trust fund to be built up under and by virtue of the annuity covenant was caught by the charge, and as it will be impossible to say, until it is ascertained, whether ultimately the infants or the husband become entitled to this fund, it has been suggested on behalf of the Custodian, and I think wisely, that instead of the quarterly or annual payments under this covenant being paid over to the Custodian they should be kept in medio, accumulated by the trustees with half-yearly rests, and paid or transferred half yearly into a joint account of the trustees and the Custodian, and I will so direct.

Solicitors: *Trotter, Goodhall & Patteson; Coward & Hawksley, Sons & Chance.*

(1) [1923] 1 Ch. 56, 68, 69, 72, 73.
(2) [1922] 1 Ch. 302, 311.
(3) [1923] 1 Ch. 62, 64.

G. R. A.

GIUSTI PATENTS AND ENGINEERING WORKS, LIMITED *v.* MAGGS.

ASTBURY J.
1923
March 23, 27.

[1922. G. 2409.]

Certiorari—County Court Action—No Jurisdiction—Certiorari on Plaintiff's Application—No Appearance entered—Judgment in Default—Irregularity ab initio—Judgment set aside.

A plaintiff who voluntarily sues in a county court which, owing to a defence there raised, has no jurisdiction, is not entitled to remove the proceedings to the High Court by certiorari.

Sowton v. *Cutler* (1675) 2 Rep. Ch. 108 applied.

Edwards v. *Bowen* (1826) 2 S. & S. 514; 2 Russ. 153 distinguished.

If such a plaintiff succeeds in obtaining an ex parte order for certiorari the defendant need not enter an appearance in the High Court. The plaintiff is not entitled to judgment in default of appearance, and such a judgment, if obtained by him, will be set aside for irregularity.

MOTION.

On July 24, 1922, the plaintiffs sued the defendants Maggs, a commercial traveller, R. J. Pryce & Co., ironmongers, and H. Thompson & Sons, Ld., manufacturers, in the Lowestoft County Court for infringement of a patent for a tin opener, claiming an injunction and 100*l.* damages.

On September 4 the defendant manufacturers gave notice of their intention to dispute the validity of the patent, a defence which ousted the county court jurisdiction: *Reg.* v. *Halifax County Court Judge.* (1)

On September 21 the plaintiffs obtained an ex parte order from a Chancery Master for a writ of certiorari removing the action to the Chancery Division under s. 126 of the County Courts Act, 1888 (51 & 52 Vict. c. 43).

On October 2 the writ of certiorari was issued and on October 3 notice thereof was served on all the defendants.

On October 18 the plaintiffs wrote asking the defendant manufacturers to enter an appearance in the High Court without delay, so that the plaintiffs might issue the necessary summons for directions.

On October 19 the defendant manufacturers replied pointing out that the ex parte removal by certiorari was erroneous, and reserving their rights, but asking for notice of any steps the plaintiffs might take.

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(1) [1891] 2 Q. B. 263.

On October 21 they again wrote stating that they were under the impression that a writ of certiorari was always obtained by the defendant, and not by the plaintiff, and asking under what rule the defendants could enter an appearance.

On November 16 after some further correspondence the plaintiffs served a fresh notice of the writ of certiorari on all the defendants requiring them to enter an appearance at the central office within eight days.

On November 18 the defendant manufacturers replied asking under what rule the plaintiffs were entitled to require them to enter an appearance.

On January 10, 1923, the plaintiffs wrote a final letter requesting the defendant manufacturers to enter an appearance, in default of which they would move for judgment.

On January 26 the plaintiffs filed a statement of claim, and on February 9 they obtained judgment against all the defendants in default of appearance, or, as expressed in the order, in default of defence.

On March 8 the defendant manufacturers issued a notice of motion to set aside the judgment on the ground that (*a*) the order for the writ of certiorari was improperly obtained ex parte; (*b*) the plaintiffs were not entitled to that order; (*c*) the order would not have been made if the applicants had had an opportunity of showing cause against the issue of the writ; (*d*) the judgment of February 9, 1923, was made ex parte under a misapprehension and without knowledge of the true position; (*e*) the proceedings had been wholly irregular.

A similar notice of motion was issued by the other defendants, who had been similarly pressed, but declined to enter an appearance.

Luxmoore K.C. and *Sheldon* for the defendant manufacturers. The plaintiffs' proper remedy was to transfer the action under s. 90 of the Judicature Act, 1873 (36 & 37 Vict. c. 66). The application would have been by originating summons and both parties would have been heard: Annual Practice, 1923, p. 2090.

Sect. 126 of the County Courts Act, 1888, does not make certiorari the proper remedy, unless it was so before that Act, and it is clear that where the plaintiff selected his tribunal, certiorari could only be obtained by the defendant: *Sowton* v. *Cutler* (1); Mitford's Pleadings in Chancery, 5th ed. (1847), p. 60; Bacon's Abridgment, 7th ed. (1832), vol. ii., p. 12; Harrison's Chancery Practice, 1st ed. (1741), p. 103; 2nd ed. (1808), p. 50.

There was an apparent exception in replevin actions which the plaintiff was obliged to bring in the sheriff's Court: *Edwards* v. *Bowen* (2); or possibly where an action properly commenced in the High Court had been wrongly transferred to the county court: *General Estates Co.* v. *Beaver.* (3) But in those cases the plaintiff was not responsible for selecting the inferior forum.

The modern practice books really assume that certiorari is only obtainable by the defendant. The Annual Practice, 1923, p. 2249, states that the defendant should enter an appearance, otherwise the plaintiff may apply for a procedendo to send the case back to the inferior Court. The plaintiff cannot in any case be compelled to proceed in the High Court: *Harrison* v. *Bull.* (4)

There is no practice rule requiring a defendant to enter an appearance to a certiorari obtained by a plaintiff, or enabling him to obtain judgment in default. His only remedy is procedendo, which in this case is obviously useless. The result is that the whole course of procedure has been wrong ab initio, and the judgment should be set aside with costs.

Gavin Simonds for the other defendants.

Courtney Terrell for the plaintiffs. Although it is probably unusual to order certiorari on a plaintiff's application, the Court has jurisdiction to do it in a proper case: *Edwards* v.

(1) 2 Rep. Ch. 108.

(2) 2 S. & S. 514; 2 Russ. 153.

(3) [1912] 2 K. B. 398.

(4) [1912] 1 K. B. 612.

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Bowen (1); *General Estates Co.* v. *Beaver.* (2) It can clearly be done after judgment: *Chipperfield* v. *Rust* (3); Seton, 6th ed., p. 840; *Rowell* v. *Breedon.* (4)

Now here the jurisdiction was exercised, and the writ was issued. The defendants' only remedy was by a motion to quash the writ or an application for a supersedeas: Chitty's Archbold, 14th ed., p. 1560. Instead of that, they allowed the writ to stand and the proceedings to be brought here. Surely the High Court practice ought to be followed in such circumstances: *Davies* v. *Williams* (5); Annual Practice, 1923, p. 2249.

Luxmoore K.C. in reply. In *Davies* v. *Williams* (5) the transfer was made on the defendants' application under s. 90 of the Judicature Act, 1873. Here the proceedings have been wrong from beginning to end and the defendants can rely on that without moving to quash the writ.

ASTBURY J. [after stating the facts.] The first question is whether the plaintiffs having chosen a tribunal which would have no jurisdiction if the most common defence in a patent action were put in, were entitled to remove that action by certiorari when that defence was put in.

For many years provision has been made for the removal of civil cases from inferior Courts without having recourse to the cumbrous and old-fashioned proceeding by certiorari. Sect. 90 of the Judicature Act, 1873, empowers the High Court to transfer proceedings from an inferior Court in cases where the defence involves matter beyond that inferior Court's jurisdiction. In the Chancery Division the application for a transfer under this section is made by originating summons and both sides are heard.

Sect. 126 of the County Courts Act, 1888, empowers the High Court to order the removal "by writ of certiorari or otherwise" of any action commenced in the inferior Court, if the High Court shall deem it desirable that the action shall be tried in the High Court. That section does not however suggest that certiorari is the proper remedy where it was not so before the 1888 Act.

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(1) 2 S. & S. 514; 2 Russ. 153.

(2) [1912] 2 K. B. 398.

(3) (1879) Unreported.

(4) (1835) 3 Dowl. 324.

(5) (1879) 13 Ch. D. 550.

Now where the defendant obtains a writ of certiorari before judgment, he is bound to enter an appearance in the central office as soon as possible after the return of the writ. Otherwise the plaintiff may apply for a procedendo to send the case back to the inferior Court: see Annual Practice, 1923, p. 2249. But these provisions obviously do not contemplate such a writ being obtained by the plaintiff.

Sect. 114 provides that where an action is commenced over which the county court has no jurisdiction, the judge shall, unless the parties consent to the jurisdiction, order it to be struck out. This is not conclusive, but it throws a strong light on what is intended to happen to a plaintiff who chooses the wrong Court.

On the question whether the plaintiff can obtain a writ of certiorari there is only one direct authority. In *Sowton* v. *Cutler* (1) the plaintiff in an inferior Court being unable to proceed, because his witnesses were out of the inferior Court's jurisdiction, prayed a certiorari to move the proceedings into Chancery. The defendant (inter alia) objected by demurrer that it was not practicable "for the plaintiff to remove his own bill by certiorari." Lord Nottingham held that the demurrer was good. That is a direct decision, and indeed the only decision dealing with this point. It decides that where a plaintiff voluntarily sues in a Court that has no jurisdiction, he cannot cure his mistake and remove the proceedings by certiorari. By that I am clearly bound.

The plaintiffs rightly referred to *Edwards* v. *Bowen*. (2) In that case the plaintiff in replevin commenced his action in the only possible Court—namely, the sheriff's Court—whence it was removed to a Court of Great Sessions. The freehold title being in question the plaintiff applied for a certiorari. Leach V.-C. said: "In the text writers there is no qualification stated as to the right of the plaintiff to the writ of certiorari in all cases; and the subject is not to be deprived of a beneficial writ in the particular case, merely because he is not prepared with a precedent precisely in point. If, however, it be necessary for the plaintiff here to lay a special ground for the writ, it is a sufficient ground that, in all other cases, the plaintiff has an election to proceed either in the superior or inferior Court; but, in replevin, the action must commence in the sheriff's Court." That was a decision that in a replevin action the plaintiff, being bound to commence his action in the inferior Court, might obtain certiorari. But Leach V.-C. was inaccurate in saying that there was no qualification in the text-books as to the plaintiff's right in all cases.

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(1) 2 Rep. Ch. 108.

(2) 2 S. & S. 514, 515.

The case went on appeal to Lord Eldon L.C. (1), and it was agreed that it should be treated as a motion originally made before him, there being some doubt as to the Vice-Chancellor's jurisdiction in the matter. Lord Eldon ordered the writ to issue in the particular case, but the right of a plaintiff in all cases to certiorari was not discussed. Nor was *Sowton* v. *Cutler* (2) referred to.

The text-books both before and after Leach V.-C.'s decision have treated the matter as quite clear.

In Mitford's Pleadings in Chancery (1847), 5th ed., p. 60, Lord Redesdale states that "When an equitable right is sued for in an inferior Court of equity, and by means of the limited jurisdiction of the Court the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior Court; the defendant may file a bill in Chancery, praying a special writ, called a writ of certiorari, to remove the case into the Court of Chancery." For this he cites *Sowton* v. *Cutler*. (2)

In Bacon's Abridgment, 7th ed. (1832), vol. ii., p. 12, it is stated that "The writ of certiorari is used for the purpose of removing not only legal, but likewise equitable proceedings; for when an equitable right is sued for in an inferior Court of equity, and by reason of the limited jurisdiction of the Court, the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior Court; the

(1) 2 Russ. 153, 159.

(2) 2 Rep. Ch. 108.

defendant may file a bill in Chancery praying this writ to remove the cause into the Court of Chancery." A sidenote states that "The plaintiff below, it seems, is not at liberty to make this application."

This sidenote is based on Harrison's Chancery Practice, or The Accomplished Practiser in the High Court of Chancery, 1st ed. (1741), p. 103, 2nd ed. (1808), p. 50, where it is stated that "not the plaintiff, but only the defendant in an inferior Court of equity, may remove the proceedings hither by certiorari."

I do not see any way of escaping from Lord Nottingham's decision and the text-book statements which I have read and many others which take the same view. I must therefore hold that the order for the certiorari was wrongly made, and the whole subsequent proceedings bad ab initio.

The matter however does not end there. About four months after the writ of certiorari was issued the plaintiffs moved for judgment in default of appearance. Now I am unable to find any rule compelling defendants to enter an appearance to an action removed by certiorari on a plaintiff's application. This is not at all surprising, because a plaintiff who has chosen his forum cannot properly obtain a certiorari.

The plaintiffs contend that the High Court rules apply as soon as a certiorari is de facto granted. But the Annual Practice, 1923, p. 2249, states that: "Where certiorari is issued before judgment defendant should enter an appearance in Central Office as soon as possible after the return of the writ into Court, otherwise plaintiff may"—not move for judgment in default of appearance, but—"apply for a procedendo to send the case back to inferior Court. Plaintiff may apply for procedendo immediately after return of the certiorari, and unless defendant appears within four days after receiving notice of such application, procedendo will be granted." It is clear that the authors do not assume that the plaintiff has an alternative remedy by judgment in default of appearance.

On these grounds I am of opinion that the judgment, in

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default of appearance, which was granted under a misapprehension as to the true position, must be set aside with costs. There will be the same order on both motions.

Solicitors for the defendant manufacturers: *Tarry, Sherlock & King, for Blyth & Hornor, Norwich.*

Solicitors for the other defendants: *Botterell & Roche, for Chamberlin, Talbot & Bracey, Lowestoft.*

Solicitors for the plaintiffs: *Bono & Nimmo.*

G. R. A.

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[1921. A. 2236.]

Landlord and Tenant—Lease—Restrictive Covenants—Not to "permit or suffer" carrying on of certain Businesses—Not to Assign or Underlet—Underlease with similar Covenants—Breaches by Lessee and Underlessee—Continuing Breach—Right of Re-entry—Duty of Lessee to take legal Proceedings to restrain Breach—Waiver of Breach—Conveyance of freehold Reversion subject to Lease—Purchaser's Knowledge of Breach—Benefit of Condition already broken to run with Reversion—Condition of Re-entry waived before Conveyance—Conveyancing Act, 1911 (1 & 2 *Geo.* 5, *c.* 37), *s.* 2.

By lease dated March 24, 1919, T. demised to the defendant R. a shop for fourteen years. The lease contained a covenant by R. that he would not use or exercise or "permit or suffer" any other person to use or exercise in or upon the demised premises any trade or business other than that of a bag manufacturer. There was also a covenant that the lessee or any permitted assignee or underlessee would not assign underlet transfer or part with the possession of the premises or any part thereof or do or suffer any act whereby the same or any part thereof might become assigned or transferred to any other person without the consent of the lessor; and there was a proviso for re-entry on breach of either of those covenants.

In October, 1920, R., with T.'s consent, underlet the premises to the defendant C. to be used for the business of a tobacconist. The underlease contained the same covenants—mutatis mutandis—by C. with R. as those entered into by R. in the lease to him, except that the business of a tobacconist was substituted for that of a bag manufacturer, and that the premises were not to be assigned or underlet by C. without the consent of both the superior and immediate lessors. On November 3, 1920, the plaintiff agreed to purchase the fee simple in reversion of the demised premises. On November 8 C., without the consent of either of the lessors, let part of the shop to G., who agreed not to use that part for any other business than that of a hairdresser; G. then went into possession and carried on—for several months in the name of C.—the business of a hairdresser, C. in the meantime concealing from both R. and the plaintiff the fact that he had underlet to G. and that G. was the proprietor of the hairdressing business.

On December 22, 1920, the plaintiff completed his purchase, and the premises were then conveyed to him expressly subject to the lease of March 24, 1919. On January 19, 1921, the plaintiff's solicitors, by arrangement with the vendor, received the rent due at Christmas, 1920, subject to its apportionment as between T. and the plaintiff.

Neither the plaintiff nor the defendant R. knew that G. was in occupation of part of the shop or that he was the proprietor of the hairdressing business until March, 1921. As both the defendants R. and C. refused to remedy the breaches when they came to the plaintiff's knowledge, the plaintiff commenced this action to recover possession of the demised premises:—

Held, first, that, in the absence of facts which rendered it unreasonable for R. to bring an action against C. in respect of the breach, and seeing that C. could have no defence to such an action, R. in breach of the covenant in the lease of March 24, 1919, had permitted and was permitting G. to carry on the prohibited business of a hairdresser: secondly, that, as neither the plaintiff nor his solicitors knew, at the time of the receipt of the rent, that C. had underlet to G. or that G. was carrying on a hairdresser's business, such receipt did not amount to a general waiver of the covenant; and further, that, even if the plaintiff had at that time some general knowledge that a hairdresser's business was being carried on on the premises, yet such receipt, in the circumstances, would amount, at most, to a waiver of the breach up to the date thereof; thirdly, as to the covenant against underletting: that, although the conveyance to the plaintiff was made expressly subject to the lease to R., yet, in the absence of proof of waiver by T. (the vendor) or the plaintiff, both of whom were ignorant of the breach committed by C. in underletting to G., the effect of that conveyance was, by virtue of s. 2 of the Conveyancing Act, 1911, to pass to the plaintiff, with the reversionary estate in the land, the right to enforce the condition of re-entry; and lastly, that as the defendant C. was guilty of a deliberate breach of the covenant by underletting to G. he was not entitled to the protection afforded to an underlessee by s. 4 of the Conveyancing and Law of Property Act, 1892.

Berton v. *Alliance Economic Investment Co.* [1922] 1 K. B. 742 distinguished.

It is not established by the authorities that in no circumstances can a covenantor be said to be permitting or suffering a breach of a continuous nature if in order to stop it he must have recourse to legal proceedings. Every case must depend upon its own circumstances.

WITNESS ACTION.

By a lease dated March 24, 1919, E. J. Tillard demised to the defendant Rose a messuage and shop, No. 16 High Street in the Liberty of Folgate in the County of London, for a term of fourteen years from March 25, 1919, at a yearly rent of 130*l*. The lease contained covenants by the lessee for himself and his assigns (amongst others) that he would not use or exercise or permit or suffer any other person or persons to use or exercise in or upon the demised premises or any part thereof certain trades or businesses therein specified nor otherwise than for the purpose of a wholesale bag and portmanteau manufacturer, and also that the lessee or any permitted assignee or underlessee would not at any time or times during the term assign, underlet, transfer or part with the possession of the premises or any part thereof, or do or suffer any act whatsoever, whereby the same or any part thereof might become assigned or transferred unto any other person or persons whomsoever without the consent in writing of the lessor for every such assignment, underlease or transfer from time to time first given. The lease also contained the usual proviso for re-entry on breach of any of the lessee's covenants.

On September 15, 1920, Tillard gave his consent in writing to a sub-lease which the defendant Rose desired to grant to the defendant Cohen. On September 22, 1920, Tillard died, and his wife became his legal personal representative. At the request of the defendant Rose, Mrs. Tillard gave her consent in writing to the demised premises being used for the purpose of the business of a retail tobacconist, which was the business which the defendant Cohen was going to carry on thereat.

In pursuance of the licences so obtained, the defendant Rose, on October 12, 1920, granted to the defendant Cohen an underlease of the premises for the whole of the residue of the term granted by the lease of March 24, 1919, less the last day thereof at the yearly rent of 200*l*. This underlease contained the same covenants (mutatis mutandis) as those contained in the original lease, with the exception that the trade of a retail tobacconist was substituted for the trade of a wholesale bag and portmanteau manufacturer in the covenant restricting the carrying on of trades and businesses, and that the consent in writing of the superior lessor as well as that of the immediate lessor had to be obtained to any assignment, underlease or transfer.

On November 3, 1920, Mrs. Tillard caused the premises to be put up for sale by auction subject to the lease granted to the defendant Rose, and at such auction the plaintiff bid for and became the purchaser thereof at the price of 2150*l.*

On November 8, 1920, the defendant Cohen entered into an agreement in writing with one Goodman, whereby the defendant Cohen agreed to let and Goodman agreed to take part of the premises comprised in the lease of March 24, 1919 (namely, the back part of the shop), for the term of three years from October 25, 1920, at the rent of 2*l.* per week. This tenancy agreement contained a stipulation that Goodman was to use the premises let to him for the trade or business of a hairdresser only, and was not to permit the same to be used for any other trade or business whatsoever without the consent in writing of the defendant Cohen. The agreement also contained a provision that Goodman should have the option of taking the premises for a further term of three years on certain conditions therein mentioned.

No consent in writing was asked for or obtained by the defendant Cohen before entering into this agreement, either from Mrs. Tillard, or from the plaintiff, or from the defendant Rose. Goodman forthwith took possession of the back part of the shop comprised in his tenancy agreement, fitted it up as a barber's shop and shortly afterwards commenced to carry on the business of a hairdresser therein. Goodman, with the permission of the defendant Cohen, caused various announcements as to the nature of his business to be affixed to the front part of the dwelling house and shop comprised in the lease of March 24, 1919. Those announcements were placed on signboards projecting into or facing the street, and on the side door of the premises. In none of those announcements did the name Goodman appear. The announcement on the side door was headed by the following words in large letters: "The Dome Haircutting and Shaving Saloon." The defendant Cohen was carrying on his business of a retail tobacconist on the premises under the style of "The Dome

Tobacco Company," which was his registered business name. The Court was satisfied by the evidence adduced at the trial that the hairdressing business was opened and for some months afterwards carried on in the defendant Cohen's name, and that Cohen concealed from both the defendant Rose and the plaintiff the fact that he had let the back part of the shop to Goodman, and that Goodman was the proprietor of the hairdressing business.

On December 22, 1920, the plaintiff completed his purchase, and by a conveyance of that date Mrs. Tillard conveyed the premises unto and to the use of the plaintiff in fee simple "subject to but with the benefit of the lease" of March 24, 1919.

For the purpose of paying the balance of his purchase money the plaintiff had provided his solicitors, Messrs. Brighten & Lemon, with the sum of 1827*l.* 10*s.* Messrs. King, Adams & Co. were the solicitors acting for the vendor, Mrs. Tillard; and it was arranged between them and Messrs. Brighten & Lemon that the latter should collect from the defendant Rose the whole of the quarter's rent due on December 25, 1920 (less one half-year's tax), and should in the completion account give immediate credit for the proper proportion of the amount so to be collected in satisfaction of the rent accrued due up to the date of completion. Accordingly, the purchase was completed on this footing, and Messrs. King, Adams & Co. on the same day wrote a letter to the defendant Rose asking him to pay the rent due on December 25 to the plaintiff, and handed this letter to Messrs. Brighten & Lemon, who on December 24 forwarded it to the defendant Rose asking him to pay the rent to them, which he did on January 6, 1921. On January 19, 1921, Messrs. Brighten & Lemon, at the request of the plaintiff, sent him particulars of their costs and a copy completion statement and cash account. The latter showed that they had received a sum of 13*l.*, made up of 32*l.* 10*s.* for rent less 19*l.* 10*s.* for one half-year's tax.

In the month of February, 1921, the plaintiff for the first time heard that Goodman had some interest in the property, and on March 15, 1921, he caused to be served on each of the defendants Rose and Cohen a notice in writing under s. 14, sub-s. 1, of the Conveyancing Act, 1881, specifying the particulars of various breaches of covenant which he complained of, and requiring the defendants or one of them to remedy the same, and to make reasonable compensation in money for the breaches. The breaches of covenant specified in this notice included, amongst others, assigning or underletting the premises or some part thereof without the consent of the plaintiff, and carrying on a business other than that of a retail tobacconist. On the defendant Rose receiving this notice, he at once caused a notice in similar terms to be served on the defendant Cohen. Before receiving the notice the defendant Rose had become aware that a hairdressing business was being carried on upon the premises, whereupon he had called upon the defendant Cohen and had told him that he had not obtained a licence for the carrying on of such a business. The defendant Cohen then informed the defendant Rose that it was usual in the neighbourhood for a tobacconist to have a barber's shop. The defendant Rose thereupon went round the neighbourhood and satisfied himself that this information was correct, and took no further steps. The defendant Cohen at this interview did not mention Goodman's name, and the defendant Rose thought that the hairdressing business was being carried on by the defendant Cohen.

It was not until after the service of the notice under the Conveyancing Act that either the plaintiff or the defendant Rose first knew or had their attention called to the fact that Goodman was in occupation of the barber's shop and was the proprietor of the hairdressing business. On March 16 and 17 the plaintiff's surveyor wrote letters to the defendants Rose and Cohen stating that he had been instructed by the plaintiff to make a survey of the property, and that he proposed to attend on March 18 for that purpose. Neither of the defendants having remedied the breaches, the plaintiff on September 28, 1921, commenced this action against the defendants Rose and his underlessee to recover possession of the demised premises, on the ground that they or one or other of them had in breach of the lessee's covenants in the lease of March 24, 1919, done or permitted to be done without the consent of the plaintiff (amongst other acts) the following: carrying on the business of a hairdresser; underletting part of the shop to Goodman, and displaying a sign advertising the hairdressing business. The defendants denied the breaches, and pleaded, on the part of the defendant Rose, absence of knowledge of the breaches committed by Cohen, and on the part of the defendant Cohen, knowledge and approval by the plaintiff or his predecessor in title of the breaches and waiver of the right of forfeiture.

Jenkins K.C. and *Warwick Draper* for the plaintiff. There has been a breach of both the covenants restricting the user of the demised premises for business purposes, and against underletting. When the plaintiff purchased from Tillard, he knew nothing of the sub-letting by Cohen to Goodman; he did not become aware of that sub-letting until after he served Rose with notice of the breaches. The defendant Rose was guilty of "permitting or suffering" a breach of the covenant as soon as he knew that the business of a hairdresser was being carried on by Goodman in breach of the covenant in the lease of March 24, 1919. There can be no question that Rose must have succeeded if he had brought an action against Cohen to restrain him from committing a breach, which was of a continuous nature, by allowing Goodman to carry on the prohibited business, since there could have been no defence. By omitting to take active steps to stop the breach, Rose was guilty of permitting the breach within the meaning of the covenant: *Ricketts* v. *Enfield Churchwardens.* (1) *Wilson* v. *Twamley* (2) is distinguishable, because there the breach complained of was not of a continuous nature; but, as it consisted of an isolated act of the sub-lessee of the defendant and not of his agent, in consequence of which renewal of the licence was refused,

(1) [1909] 1 Ch. 544.

(2) [1904] 2 K. B. 99.

the defendant was held not to be liable. It was not intended in that case to limit the liability of the covenantor in the case of a breach of a continuous nature to breaches on the part of his agent. Besides, the covenant by Rose was that neither he nor his assign (Cohen) would permit the breach, and unless Rose is entitled to relief in respect of the breach, which is denied, he is liable for having permitted a breach of the covenant through the carrying on of a hairdressing business.

[They also referred to Foa on Landlord and Tenant, 5th ed., pp. 125, 126.]

Further, there has been a direct breach by the defendant Rose of his covenant against underletting, since he covenanted not only that he himself but his underlessee would not underlet without the consent of the plaintiff; and the plaintiff had no knowledge of the underletting to Goodman at the time his solicitors received the Christmas rent.

Owen Thompson K.C. and *A. W. Elkin* for the defendant Rose. The defendant Rose is not liable for the breach of covenant, if any, committed by the defendant Cohen. Rose did not permit or suffer the act of his sub-lessee in underletting to Goodman for the purpose of carrying on a hairdressing business. Cohen was the sub-lessee of Rose and not his agent for that purpose: *Toleman* v. *Portbury* (1); *Hall* v. *Ewin*. (2) In *Berton* v. *Alliance Economic Investment Co.* (3) the breach was of a continuous nature, but no distinction is drawn between a single act in breach of a covenant and a continuous breach. A covenant not to permit or suffer an act does not oblige the covenantor to bring an action when the act is already done; and, even if the covenantor would be obliged, in certain circumstances, to take legal proceedings, it would not be obligatory on him to do so, if the result of those proceedings were reasonably open to doubt. In *Powell* v. *Hemsley* (4) the breach was not of a continuous nature: the covenant was broken once and for all when the building was erected contrary to the covenant, and there the covenantor

(1) (1870) L. R. 5 Q. B. 288.
(2) (1887) 37 Ch. D. 74.
(3) [1922] 1 K. B. 742.
(4) [1909] 1 Ch. 680.

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was held not liable for the breach. The words "permit and suffer" involve some active encouragement of the breach, the doing of some acts or the abstention from taking some reasonable step to prevent the breach. The words relate to breaches by an agent of the covenantor: the principle which renders the covenantor liable—namely, "respondeat superior"—cannot apply when the breach has been committed once and for all and the covenantor was not in a position to prevent it. The authorities do not establish that he is bound to take legal proceedings, even in a case where no defence seems possible.

The breach by Cohen on November 8, 1920, was waived by Tillard, the vendor to the plaintiff, when he conveyed the freehold reversion on December 22, 1920, to the plaintiff expressly subject to the lease to Rose. By so conveying he recognized the subsistence of the lease, and the question whether Tillard or the plaintiff were cognisant of the breach or not is not material for consideration. The plaintiff could take nothing at law under that conveyance except a reversionary estate in the premises; he was therefore estopped from asserting that the lease was forfeited. An intention to pass the right of re-entry must be shown: all that the plaintiff acquired under the conveyance was the reversion. There was an unequivocal act of waiver on the part of the vendor when he conveyed the premises to the plaintiff subject to and with the benefit of the lease, and the onus rests with the plaintiff to prove ignorance of the breach. The right of re-entry consequent upon the breach was not in the circumstances assignable: *Hunt* v. *Bishop* (1); *Hunt* v. *Remnant*. (2) The decisions in those cases were not affected by s. 2 of the Conveyancing Act, 1911. In *Davenport* v. *Smith* (3) the plaintiff entered into the contract with knowledge of the circumstances under which the right of re-entry had become enforceable, and it was there held that the conveyance being made subject to the lease there was an unequivocal recognition of the subsistence of the lease, and that the conveyance did not carry with it, by virtue of s. 2 of that Act, the right of re-entry for a breach then already waived.

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(1) (1853) 8 Ex. 675.

(2) (1854) 9 Ex. 635.

(3) [1921] 2 Ch. 270.

[*Jenkins K.C.* referred to *Matthews* v. *Smallwood.* (1)]

That case is distinguishable: it shows that, where waiver is pleaded, some act unequivocally recognizing the lease must be shown and knowledge at that time of the circumstances which gave rise to the right of re-entry.

There was waiver of the breach by the receipt of the Christmas rent; the plaintiff was aware when the rent was received that a hairdresser's business was being carried on on the premises; that knowledge involved knowledge that the premises must have been structurally altered and that Goodman must have had granted to him some interest in the premises; the breach was a continuous breach and was waived by the receipt of the rent: *Waldron* v. *Hawkins* (2); *Griffin* v. *Tomkins.* (3)

J. G. Joseph for the defendant Cohen.

Jenkins K.C. in reply. *Hall* v. *Ewin* (4) has no application to the present case, because there the defendant was not an assign of the lease; he was not bound by the covenant at law, but only in equity by notice; the Court there refused to extend the doctrine of *Tulk* v. *Moxhay* (5) to a person who was merely passive and was himself doing nothing in violation of the covenant.

The cases of *Hunt* v. *Bishop* (6) and *Hunt* v. *Remnant* (7) turned on points which have been rendered obsolete by s. 2, sub-s. 1, of the Conveyancing Act, 1911, which caused the benefit of a condition already broken to run with the reversion assigned. Had the vendor, before his conveyance to the plaintiff, waived his right of re-entry, it would follow that he would have no right of re-entry to which s. 2 of the Act of 1911 could apply. The question of knowledge is material: neither the vendor nor the plaintiff knew of the forfeiture, and the onus lies on the defendants to prove that either the vendor or the plaintiff had knowledge of the forfeiture at the time of the conveyance to the plaintiff: *Matthews* v. *Smallwood.* (1) The property in effect was sold to the plaintiff subject to and with the benefit of the lease with all faults.

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(1) [1910] 1 Ch. 777.
(2) (1875) 32 L. T. 119.
(3) (1880) 42 L. T. 359.
(4) 37 Ch. D. 74.
(5) (1848) 2 Ph. 774.
(6) 8 Ex. 675.
(7) 9 Ex. 635.

Even if the acceptance of the rent on January 6, 1921, amounted to a waiver of the breach of the covenant against carrying on the business of a hairdresser up to that date, it did not amount to a general waiver of the breach committed by the underletting to Goodman for the purpose of carrying on that business, as the plaintiff was at the time of such acceptance ignorant of the underletting.

As regards *Wilson* v. *Twamley* (2) the Court did not intend to confine that decision to a case where the breach was by an agent of the covenantor: that case shows that the Court will investigate the circumstances and ascertain what the covenantor could reasonably be expected to have done. In this case Rose was permitting a breach, since it was clear that neither Rose nor Cohen could have any defence.

Since by the Conveyancing and Law of Property Act, 1892, relief may be granted to an underlessee, it would appear that the defendant Cohen is in a more favoured position than Rose; but Cohen is clearly not entitled to relief, seeing that he himself by his own deliberate act brought about the breach.

Cur. adv. vult.

Jan. 25. P. O. LAWRENCE J. delivered the following written judgment: In this action the owner of a freehold house and shop claims to be entitled to enforce a condition of re-entry contained in a lease granted by his predecessor on the ground of certain alleged breaches of covenant. The defendants are the original lessee and his sub-lessee, and their defence consists of a denial of the breaches and alternatively of a plea of waiver. [His Lordship then stated the facts and continued:] In these circumstances the first question which falls to be determined by the Court is whether the defendant Rose has "permitted or suffered" Goodman to use or exercise in or upon some part of the demised premises the trade or business of a hairdresser, within the meaning of the covenant contained in the lease of March 24, 1919, and has consequently committed a breach of that covenant. In my judgment the defendant Rose has permitted or suffered and is still permitting and suffering the carrying on of the hairdressing business and, therefore, has committed and is still committing a breach of his covenant. In my opinion, it is plainly within the power of the defendant Rose to stop the business which Goodman is carrying on. It is true that, in order to do so, he may have to commence and prosecute the appropriate legal proceedings. It is also true that it cannot be affirmed, as a general proposition, that a covenantor under such a covenant is committing a breach of the covenant, whatever the facts may be, unless he takes legal proceedings to prevent or stop the continuance of the prohibited business. Every case must depend upon its own circumstances. In the present case, however, it is proved that the defendant Cohen could have no defence to an action brought by the defendant Rose, and that there are no facts which would render it unreasonable for the defendant Rose to bring an action against the defendant Cohen which could have but one result. In these circumstances, I am of opinion that, so long as the defendant Rose abstains from taking the proper steps for preventing the business from being carried on, he is permitting or suffering the business to be carried on.

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(1) [1910] 1 Ch. 777.

(2) [1904] 2 K. B. 99.

The cases cited by Mr. Thompson in support of the contrary view are in my opinion distinguishable on the facts. Both in *Toleman* v. *Portbury* (1) and in *Wilson* v. *Twamley* (2) the act which constituted the breach consisted of a single act done by an underlessee, which act the lessee had not authorized and had no power to prevent; no question arose as to the lessee permitting or suffering a continuing breach which he could stop. What I understand these cases to have decided is that a lessee is responsible only for acts done (and

(1) L. R. 5 Q. B. 288.

(2) [1904] 2 K. B. 99.

for abstention from action) by himself or by his servants or agents, and that, as an underlessee is neither a servant nor an agent of the original lessee, the latter cannot properly be said to have permitted or suffered an act done by the underlessee which the original lessee had no means of preventing. The case of *Hall* v. *Ewin* (1) is, in my opinion, distinguishable from the present case, on the ground that there the defendant was not bound at law by the covenant, but was only bound on the principle of *Tulk* v. *Moxhay* (2), by reason of his having acquired the property with notice of the restrictive covenant. This fact formed the sole ground of the decision, and the Court (after expressly declining to give any opinion whether the plaintiff would have had a right of action, if the defendant had been bound at law) decided that, according to the settled principle governing such cases, it could not compel the defendant to do anything which would involve him in expense.

There remains to be considered the case of *Berton* v. *Alliance Economic Investment Co.* (3), which is more in point. There, the Court of Appeal held that the question to be decided, in cases like the present, is whether the defendant has omitted to take or has abstained from taking some step which it was reasonable for him to take in view of the facts and circumstances. In the special circumstances of that case, it was decided that it would be unreasonable to expect the lessee to take legal proceedings, as the result of any such proceedings would be extremely doubtful, and that, therefore, he was not permitting or suffering the breach. In my opinion the decision in that case does not apply to a case like the present, where, if the proper legal proceedings were taken by the defendant Rose, there could be no defence, and the proceedings could have only one result. In the present case the facts are such as, in my opinion, to bring it within the definition of a simple case given by Atkin L.J. (4) Moreover, the judgments delivered in that case are, in my opinion, inconsistent with the contention that the cases of *Toleman* v.

(1) 37 Ch. D. 74.
(2) 2 Ph. 774.
(3) [1922] 1 K. B. 742.
(4) [1922] 1 K. B. 761.

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Portbury (1) and *Wilson* v. *Twamley* (2) have established the proposition that under no circumstances can a man be said to be permitting or suffering a continuing breach, if, in order to stop it, he has to have recourse to legal proceedings, and it is clear to my mind that the Court in *Berton's Case* (3) did not lay down any such proposition.

The next question to be determined is, whether there has been a general waiver of the covenant by the plaintiff. In my judgment no such waiver is proved to have taken place. Even if the acceptance by Messrs. Brighten & Lemon of the quarter's rent due on December 25, 1920, ought, in the circumstances, to be held to amount to any waiver at all (which I think is doubtful), I am clearly of opinion that such acceptance did not amount to a general waiver of the covenant, but at most to a waiver of the breach up to that date. Although the plaintiff knew that a hairdressing business was being carried on upon the premises, and although he would probably be presumed to have had notice, at the time when the rent was received by his solicitors, that such a carrying on amounted to a breach of covenant, there is nothing whatever proved in this case which in my opinion would justify the contention that the plaintiff by ratifying such receipt of rent waived the covenant generally. The plaintiff did not know that the business was being carried on by Goodman; and there is no evidence to show that Messrs. Brighten & Lemon knew that it was being carried on at all—even if they did know, they had no authority to waive the covenant—or that the plaintiff knew that his solicitors had received the rent, or how they had dealt with it, until January 28, 1921, or that the plaintiff had ever himself seen the lease, until he obtained the documents of title from his solicitors after that date. The inference I draw from the proved facts and documents is, that neither the plaintiff nor his solicitors, in fact, knew that a breach of covenant was being committed until some time after the rent had been received. But, even if I am wrong in drawing this

(1) L. R. 5 Q. B. 288.

(2) [1904] 2 K. B. 99.

(3) [1922] 1 K. B. 742.

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inference, I am of opinion that there are no circumstances here which would justify the Court in holding that the receipt of the rent amounted to a general waiver of the covenant. The cases of *Waldron* v. *Hawkins* (1) and *Griffin* v. *Tomkins* (2) are both in my opinion distinguishable. In the former case the lessor, when he accepted the rent, knew that the lessee had underlet the premises for a year, and it was held that permitting the tenant to remain in occupation during the remainder of the tenancy was not a new or continuing breach of covenant. In the latter case the demised building consisted originally of a church. After the granting of the lease it was structurally altered so as to convert it into two shops, one of which was occupied by persons who carried on the business of plumbers. The lessor after she knew of the alteration and of the occupation of the shop by the plumbers accepted two quarters' rent and called upon the lessee to do certain repairs to the plumbers' shop; in these circumstances it was held that the lessor must be presumed to have known that a tenancy had been granted to the plumbers and (following *Waldron* v. *Hawkins* (1)) that the lessor must be taken to have waived the covenant against carrying on the trade of plumbers so long as such tenancy lasted. These two cases would have been in point here if, before the Christmas rent was received, the plaintiff had known that the defendant Cohen had entered into a tenancy agreement with Goodman, or even had known that Goodman was occupying the back part of the shop and was carrying on the hairdressing business there. In the absence of such knowledge, however, neither decision has, in my opinion, any application in the present case.

The next matter requiring consideration is the breach of the covenant against underletting. This covenant is a direct covenant by the defendant Rose that no underlessee would underlet any part of the premises without the previous consent in writing of the lessor. It is not disputed that this covenant has been broken, but it is contended that the breach has been waived by the plaintiff. This breach differs from the

(1) 32 L. T. 119.

(2) 42 L. T. 359.

other two breaches in that it is not a continuing breach, but consists of a single act—namely, the granting of the tenancy agreement of November 8, 1920. I have already held that the plaintiff did not know of this breach when his solicitors accepted the quarter's rent due on December 25, 1920; therefore, such acceptance cannot amount to a waiver of that breach; but it is contended that the conveyance of December 22, 1920, itself amounted to a waiver. In my judgment that contention cannot prevail. The breach was committed on November 8, 1920, that is to say, between the date when the plaintiff purchased the premises at the auction and the date when the purchase was completed. The plaintiff first heard of the breach in February, 1921. It has not been suggested, much less proved, that Mrs. Tillard knew of the breach at the date of the conveyance. From the evidence I have heard I have no hesitation in inferring that she did not know; but, apart from inference, the onus of proving that she knew rests on the defendants, even although there be an unequivocal act by her recognizing the lease after the breach: see *Matthews* v. *Smallwood.* (1) It is contended, however, that, although Mrs. Tillard did not know of the breach, yet, as she conveyed the property to the plaintiff subject to the lease of March 24, 1919, and, therefore, in fact recognized its subsistence after the breach, the purchaser cannot take advantage of the antecedent breach, because all he purchased was a reversion and the breach was not a continuing one.

Three cases have been cited by Mr. Thompson in support of this contention—namely, *Hunt* v. *Bishop* (2); *Hunt* v. *Remnant* (3); and *Davenport* v. *Smith.* (4) In both *Hunt* v. *Bishop* (2) and *Hunt* v. *Remnant* (3) it was held that the conveyance of the reversion did not operate to pass the right to enforce a condition of re-entry which at the date of the conveyance was enforceable by the grantor by reason of an antecedent breach of covenant. These decisions, however, have in my opinion been rendered obsolete by s. 2 of the

(1) [1910] 1 Ch. 777.
(2) 8 Ex. 675.
(3) 9 Ex. 635.
(4) [1921] 2 Ch. 270.

Conveyancing Act, 1911, as to conveyances executed after December 31, 1911. Under sub-s. 1 of that section the benefit of every condition of re-entry or forfeiture for breach of covenant or condition is annexed and incident to and goes with the reversion, so as to enable it to be enforced by the person from time to time entitled to the income of the land leased, although that person became by conveyance or otherwise so entitled after the condition of re-entry or forfeiture had become enforceable. By sub-s. 2 it is enacted that the section shall not render enforceable any condition of re-entry or other condition waived or released before the person became entitled as aforesaid. Applying this section to the facts of the present case, I am of opinion that the conveyance of December 22, 1920, operated to pass to the plaintiff with the reversionary estate in the land the right to enforce the condition of re-entry, although already then enforceable, unless it can be shown that Mrs. Tillard had waived or released the condition before the plaintiff became entitled. If that be the right view, I am further of opinion that, in the circumstances of this case, it cannot successfully be contended that the conveyance of itself operated as a waiver or release of the condition of re-entry. The absence of knowledge by the grantor and grantee of the breach which had caused the condition to become enforceable is, in my judgment, a conclusive answer to this contention, as it is settled law that before any person can be held to have waived or released a condition of re-entry or any other condition, it is essential that such person should have knowledge of the fact which had caused the condition to become enforceable.

Mr. Thompson has argued that, because in the conveyance the property was expressly conveyed subject to the lease of March 24, 1919, it operated as a waiver or release of the condition, even though neither of the parties had any knowledge of the breach of covenant; his point, as I understood it, being that, as the purchaser could take nothing at law under the conveyance except a reversionary estate in the land, he was precluded or estopped from setting up that the lease had been forfeited and therefore from enforcing the

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condition of re-entry. In my judgment there is nothing in this point. The conveyance of December 22, 1920, is in the usual form adopted by conveyancers when drawing a conveyance of a freehold reversion, that is to say, it conveys the property to the purchaser in fee simple subject to the lease. The proposition that such a conveyance operates of itself to extinguish the right of re-entry for condition broken appears to me to be inconsistent with the enactment that such right is annexed and incident to, and, on conveyance, goes with the reversion.

The case of *Davenport* v. *Smith* (1) is, in my judgment, distinguishable from the present case on the facts. There both the grantor and the grantee at the date of the conveyance knew that the condition of re-entry had become enforceable, and this fact seems to me to have formed the basis of the decision. In these circumstances, I do not feel called upon to express any opinion as to whether I should or should not have arrived at the same conclusion.

In the result I have come to the conclusion, for the reasons stated, that the condition of re-entry contained in the lease of March 24, 1919, became enforceable on November 8, 1920, and not having since been waived or released can be enforced by the plaintiff.

There only remains to be considered the question whether both or either of the defendants are entitled to relief against forfeiture under the Conveyancing Acts. If the case had rested merely on the breach of the covenant against carrying on certain trades, it is clear that the Court could have granted relief to both defendants and, in the circumstances of this case, would have done so on proper terms. As, however, there has been a breach of the covenant against underletting, the defendant Rose is, under the express terms of the Act, not entitled to any relief against forfeiture. I regret that this is so, as the defendant Rose has undoubtedly been the innocent victim of the defendant Cohen's deliberate breach of covenant. Under s. 4 of the Conveyancing Act, 1892, however, the Court has power to give relief to the defendant

(1) [1921] 2 Ch. 270.

Cohen against the forfeiture of the lease of March 24, 1919, notwithstanding that the defendant Rose cannot get any such relief. In the circumstances of this case I decline to grant any such relief. The forfeiture has been brought about entirely by reason of the defendant Cohen having underlet part of the premises to Goodman without attempting to obtain the necessary consent of the plaintiff and of the defendant Rose, notwithstanding that the underlease of October 12, 1920, contained an express covenant against such underletting. No excuse for or explanation of this deliberate breach of covenant has been tendered, and I have not heard of the existence of a single extenuating circumstance which would induce the Court to grant any relief to the defendant Cohen.

There will be judgment for the plaintiff for the recovery of the premises and for mesne profits.

Solicitors: *G. B. Howard & Son; Charles D. Tharp; McLeod, Eyre, Dowling & Co.*

H. C. H.

Rider v. *Ford* - - [1923] 1 Ch. 541
Considered and not followed.
HUTTON *v.* WATLING
[1948] 1 Ch. 26

RIDER *v.* FORD.

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[1922. R. 1737.]

Landlord and Tenant—Agreement for Lease—Option "to purchase either the freehold or a lease of ninety-seven years"—Time for exercise of Option not specified—Rule against Perpetuities.

An agreement for a lease provided that the prospective tenant should "take the house for three, five, or seven years, and have the option of purchasing either the freehold or a lease of ninety-seven years." The tenant entered into possession but no lease was ever executed:—

Held, that the option to purchase the freehold being unlimited as to time was void, under the rule against perpetuities, but that the option to purchase the lease, being in fact an option to call for a lease, was outside the rule against perpetuities, and was exercisable so long as the relationship of landlord and tenant existed.

Held also, that an option to call for a lease was outside the rule against perpetuities, although the terms of the new lease were not the same as the terms of the original lease.

WITNESS ACTION.

The plaintiffs, the firm of Rider & Son, were builders, and were willing to build a house for the defendant on certain terms. In June, 1907, the defendant entered into an agreement with them on the terms contained in the following letter: "*Re* No. 2, Shepherd's Green. T. Rider & Son, Southwark, S.E. June 4, 1907.—We understand from a letter we have received from Mr. May yesterday that you have decided to take the additional ten feet frontage at the above. The whole matter therefore stands thus—the house to be built on the plot of land adjoining Mr. Watts, in accordance with the plans and specifications prepared by Mr. May (which we had both better sign), and to be completed as nearly as possible by Christmas next. You to take the house for 3, 5, or 7 years at the rent of 147*l.* per annum, and to have the option of purchasing either the freehold for 2,900*l.* or a lease of 97 years (ground rent 20*l.*) for 2,400*l.* If you will send us a letter accepting these terms it seems to us that this is all that will be necessary." By a letter, dated June 12, 1907, to the plaintiff's firm, the defendant confirmed the above terms, but no formal document embodying them was executed. The defendant went into possession of the said premises under the agreement on March 25, 1908, and, after the expiration of the seven years, was still in possession as tenant from year to year. By a notice dated May 26, 1922, the plaintiffs required the defendant to give up possession of the premises on March 25, 1923. The defendant claimed to be entitled to exercise the above option, as he was still in possession of the premises with the consent of the plaintiffs, who had never called upon him to elect whether he would exercise the option, and he had done nothing to abandon the same. The plaintiffs thereupon issued a writ on July 25, 1922, and asked for a declaration that the defendant was not entitled to exercise any option either to buy the freehold or a lease of the premises on the terms set out in the letter of June 4, 1907.

G. B. Hurst K.C. and *W. M. Hunt* for the plaintiffs. This is an option, unlimited as to time, to purchase either the fee or a lease for ninety-seven years. An option to purchase cannot be exercised after the expiration of the original term, but an option to renew can be exercised so long as the relationship of landlord and tenant continues. It is one thing to give an option to purchase at a fixed price within a limited time, but it is a very different thing to suppose a landlord could have intended to confer on a tenant a right to purchase at the original sum although the right may not be exercised for fifteen or twenty years. An option to purchase the reversion, and so destroy the tenancy, is not one of the terms incorporated in the tenancy from year to year which comes into operation on the expiration of the original term.

" In my opinion the option in this case (i.e., to purchase the reversion) is a matter that is wholly outside the relation of landlord and tenant, and therefore is not one of the terms of the original tenancy on which the lessee held the property when he became tenant from year to year " : per Peterson J. in *In re Leeds and Batley Breweries and Bradbury's Lease.* (1)

(1) [1920] 2 Ch. 548, 553.

Covenants to renew, and even to renew in perpetuity, have for centuries been held to be valid; but a covenant to convey the fee simple, although for all practical purposes nothing more than a covenant of perpetual renewal, comes within the rule against perpetuities: *Woodall* v. *Clifton.* (1)

Moss v. *Barton* (2) and *Buckland* v. *Papillon* (3) were both cases of options to renew and not of options to purchase as here. In both cases the option was to take a lease at the expiration of the previous term at the same rent, and therefore delay in exercising the option made no difference. In this case if the option is now exercisable the ninety-seven years would run from to-day and not from the end of the seven years. Renewal of a lease imports that the essential terms of the lease are to be renewed, as in *Moss* v. *Barton* (2) and *Buckland* v. *Papillon* (3), but here the most essential term of the tenancy is changed, and a rent of 147*l.* becomes a rent of 20*l.* If a lease to carry out the original intention of the parties had been drawn up in 1907 there can be no doubt that the exercise of the option would have been limited to the original term—namely, seven years. It is submitted that neither option is exercisable after the expiration of the seven years.

Courthope Wilson K.C. and *R. H. Hodge* for the defendant. An option such as this is an independent contract. A covenant that aims at creating at a future time the position of vendor and purchaser of the reversion, between the owner and the tenant for the time being, is not a covenant concerning the tenancy or its terms: *Woodall* v. *Clifton.* (4) There is no limitation in the agreement as to the time within which the option is to be exercised, and in those circumstances it can be exercised so long as the relationship of landlord and tenant continues: *Moss* v. *Barton* (2); *Buckland* v. *Papillon.* (3) In *In re Leeds and Batley Breweries and Bradbury's Lease* (5) the option was expressed to be exercisable only "at any time six months before the determination of the lease."

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(1) [1905] 2 Ch. 257, 263.

(2) (1866) L. R. 1 Eq. 474.

(3) (1866) L. R. 1 Eq. 477; L. R. 2 Ch. 67.

(4) [1905] 2 Ch. 257, 279.

(5) [1920] 2 Ch. 548, 552.

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More than six months after the end of the lease the tenant, who had continued on as tenant from year to year, claimed to exercise the option on the ground that it was one of the terms of the original agreement applicable to the tenancy from year to year. Peterson J. held that the tenant could not exercise the option and relied on the decision of Lord Chelmsford L.C. in *Buckland* v. *Papillon* (1): "In other words the Lord Chancellor took the view that an option given in an agreement for a lease for three years to call upon the lessor to grant a lease for a longer period would not be one of the terms of the original agreement under which the tenant from year to year holds the premises after the determination of the original term. His view was that the option to have a longer term had nothing whatever to do with the tenancy from year to year." The exercise of the option is not limited in time and the Court will not introduce stipulations which the parties have not thought fit to introduce. Although the language of the agreement gives an option to purchase the fee or to purchase a lease for ninety-seven years, in law it is an option to purchase the fee, or to call for a new lease. The first option puts an end to the tenancy, while the second operates to continue the relationship of landlord and tenant. "The option of purchasing the lease" is a valid option, and the question of perpetuity does not arise in the case of a covenant to renew a lease. The option to buy the fee is also good if it does not infringe the rule against perpetuities. This option is only exercisable by Ford while he remains in possession of the premises, or, it is submitted, by his assignee during the life of Ford.

RUSSELL J. This action is brought by the firm of Rider & Son against their tenant, the defendant, to obtain a declaration that he is neither entitled to purchase the freehold of the house which he occupies, nor to call for a lease of it. The words "have the option of purchasing a lease" in the letter of June 4, 1907, are inaccurate because Messrs. Rider were the freeholders, and there was no leasehold interest of ninety-seven years in existence which the defendant could purchase. The words really mean that the defendant should have the option of either purchasing the freehold or of obtaining a demise of the premises for ninety-seven years at a particular ground rent in consideration of the payment of a premium of 2400*l*. Is the defendant entitled in law to exercise either of these options? The plaintiffs say that this is an option to purchase, and that such an option cannot be exercised after the original tenancy conferred by the document which gives the option has expired, and that therefore the option is not exercisable by a tenant who holds over and becomes a tenant from year to year. On the other hand cases have been cited in which quite a different view has been held of options to take a fresh lease of the premises. The defendant relies on the cases of *Moss* v. *Barton* (1) and *Buckland* v. *Papillon*. (2) [After discussing these two authorities His Lordship continued:] Thus in *Moss* v. *Barton* (1), where the contract was to grant a lease on request, and no time was fixed within which the request was to be made, and in *Buckland* v. *Papillon* (2), where the contract was to grant a lease whenever called upon, it was held that the right to exercise the option continued as long as the relationship of tenant and landlord continued between the person claiming to exercise the option and the person against whom it was claimed to be exercisable.

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(1) L. R. 2 Ch. 67.

There are two options in the agreement before me, and I cannot read into it any limit in point of time except that indicated by Lord Chelmsford in *Buckland* v. *Papillon* (2)—namely, that the option exists so long as the relationship of landlord and tenant continues, notwithstanding that the original term of seven years has run out. The plaintiff relied on the decision of Peterson J. in *In re Leeds and Batley Breweries and Bradbury's Lease*. (3) In that case the plaintiff had been the lessee of certain leasehold premises under a lease dated May 19, 1903, for a term of seven years. The lease contained a proviso that if the lessee desired to purchase the unexpired residue of the leasehold

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(1) L. R. 1 Eq. 474.
(2) L. R. 1 Eq. 477; L. R. 2 Ch. 67.
(3) [1920] 2 Ch. 548.

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reversion, and should "at any time within six calendar months before the determination of this lease" give to the lessors a written notice to that effect, then the person giving the notice should be the purchaser of the unexpired residue of the term at the price of 3000*l.* In February, 1910, the term created by the lease was extended for one year from June 1, 1910, so as to determine on May 31, 1911. At the end of the extended time the plaintiff continued in possession, becoming a tenant on sufferance, and, after payment of rent, a tenant from year to year. In November, 1919, eight years after the original term had come to an end, the plaintiff gave the lessors notice of his intention to purchase the unexpired residue of the term of 999 years for 3000*l.* Peterson J. said: "In the present case there was an option on the part of the lessee to purchase the reversion at any time six calendar months before May 31, 1911. That was a conditional offer by the landlord, or a contract for sale on a performance of condition, the condition being that six calendar months before May 31, 1911, the lessee should give notice in writing of his intention to purchase." The learned judge held that in 1919 the option was no longer exercisable. That decision has no application to a case such as this where the option is not limited in time. In such a case the true view is, as appears from the authorities to which I have referred, that an option unlimited in time exists so long as the relationship of landlord and tenant continues. In my opinion the defendant is entitled to exercise this option but subject to any effect which the rule against perpetuities may have.

Defendant's counsel admits that the rule against perpetuities must render invalid the option to purchase the freehold unless the agreement is read as giving only an option to the defendant personally, or to an assignee of the defendant, but only exercisable during the defendant's life. In my opinion the agreement cannot be read in that way and therefore I hold that the option to purchase the freehold is inoperative and invalid because of the rule against perpetuities. As to the right to call for a lease of the premises the position is different; it is not disputed that under the authorities a covenant for what is called a renewal of the lease is outside the rule against perpetuities. It was argued that this was not a covenant for the renewal of a lease because the agreement in terms describes it as a right to purchase. That is merely a question of language, and it is quite inaccurate to describe as a right to purchase a lease that which is really a right to call for a lease. It was further argued that although a right to renew a lease was outside the rule this was not such a right because it was a right to call for a lease on different terms from the original. But the right to renew is a right to call for a fresh lease. The new lease is the result of a fresh demise. Even if all the provisions in the fresh lease were the same as in the old lease it would none the less be a fresh demise, and a fresh term with fresh covenants. I am unable to see any reason why the position as regards the rule against perpetuities should be any different in the case of a right to call for a lease, even though the terms may not be in all respects the same as the terms of the original lease, and in the case of a right to call for a lease in which every provision may be word for word the same as in the old lease. In my opinion the right to call for the lease of ninety-seven years, to run from the expiration of the existing tenancy, is not invalidated by the rule against perpetuities and may be exercised by the defendant.

Solicitors: *Sewell, Edwards & Nevill; Lawrance, Webster, Messer & Nicholls.*

J. B. B. M.

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[1921. B. 6239.]

Electricity—Supply—Tramways worked by Electricity—Agreement between Urban District Council and Electric Supply Company—Incorporation of Urban District with Borough—Supply of Electricity by Borough Council for working Tramways in former Urban District—Electric Lighting Act, 1882 (45 *&* 46 *Vict. c.* 56), *s.* 3, *sub-ss.* 3, 4; *s.* 4—*Electric Lighting Act,* 1909 (9 *Edw.* 7, *c.* 34), *s.* 23.

By s. 23 of the Electric Lighting Act, 1909: "Where in any area a local authority, company, or person is authorised to supply electricity under Act of Parliament or under licence or Provisional Order granted under the Electric Lighting Acts, it shall not, after the passing of this Act, be lawful for any other local authority, company, or person to commence to supply or distribute electricity within the same area unless such supply or distribution is authorised by Act of Parliament, or by licence or Provisional Order granted in terms of the Electric Lighting Acts: Provided that this section shall not prevent any company or person from affording a supply of electrical energy to any other company or person where the business of the company or person affording the supply is not primarily that of the supply of electrical energy to consumers . . . ."

Held, that a local authority was prohibited by the section from providing electricity for the purpose of working tramways owned by the local authority but situated in an adjoining area within which an electric supply company was entitled to supply electricity under a Provisional Order, and within which the local authority had no express power of supply.

Held, also, that the providing of electricity for the purpose above stated was a "supply" within the meaning of the Electric Lighting Acts, 1882 to 1919.

Dicta of North J. in *West Surrey Water Co.* v. *Guardians of Chertsey Union* [1894] 3 Ch. 513, 516, 518, commented on and explained.

Decision of Eve J. reversed.

Appeal from the decision of Eve J.

The action was brought by the Attorney-General on the relation of the Birkdale Electric Supply Company, Ld., and the company for an injunction to restrain the Southport Corporation from themselves generating for supply or distribution of electric energy for public or private purposes, or from obtaining from any company or local authority other than the relators electric energy for the lighting of public lamps and the Town Hall and other buildings, and the working of the electric tramways in the area formerly the urban district of Birkdale, and for damages.

The following statement of facts is taken from the written judgment of Warrington L.J. :—

"The relators and plaintiffs, the Birkdale District Electric Supply Company, Limited, are, by transfer from the Birkdale Urban District Council, the undertakers for the purposes of the Birkdale Electric Lighting Order, 1898, and as such undertakers are authorised to supply electricity for all public and private purposes as defined by the Electric Lighting Acts, 1882 to 1909, in the area of supply mentioned in that Order, being the then Urban District of Birkdale.

"The defendants are the Corporation of Southport, and by virtue of an Order of the Local Government Board, confirmed by Act of Parliament, are now, and have since April 1, 1912, been the local authority for the former Urban District of Birkdale, which by the last mentioned Order was incorporated with, and is now part of, the Borough of Southport. In Southport, including Birkdale, there is a continuous line of tramways, now the property of, and worked by, the defendant Corporation. Before 1912 so much of the line as was in Birkdale was the property of the Urban District Council, but was in lease to a company called the Southport Tramways Company. As from the date of the extension of the Borough the interest of the Urban District Council became vested in the Corporation, and in 1918 they obtained a surrender from the Company of their lease. Since that date the Corporation have been the owners of, and have themselves worked, the entire line of tramways. The tramways are worked by electric energy.

"Before the year 1918 the energy required for working the tramways in Birkdale was supplied to the Tramway Company by the plaintiff company. From 1918 to November, 1921, it was supplied by the company to the Corporation under the terms of an agreement of October, 1918. That agreement was duly determined by notice in November, 1921, and since that date the energy required for working the entire system of tramways, including those within the old Urban

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District of Birkdale, has been provided from the Corporation's generating station situate outside that district, and within the limits of the former Borough of Southport. The plaintiffs—the Attorney-General, on the relation of the company, and the company—dispute the right of the Corporation to provide the electrical energy for working so much of the tramways as is within the former Urban District of Birkdale being the Company's area of supply. They say the Corporation are prohibited from so doing either by s. 23 of the Electric Lighting Act, 1909, or by an agreement made between the Urban District Council and the company on the transfer of the undertaking to the company, or by both. The question turns on the construction of the Act and the agreement respectively.

"The section relied on by the plaintiffs is in the following terms: 'Where in any area a local authority, company, or person is authorised to supply electricity under Act of Parliament or under licence or Provisional Order granted under the Electric Lighting Acts, it shall not, after the passing of this Act, be lawful for any other local authority, company, or person to commence to supply or distribute electricity within the same area unless such supply or distribution is authorised by Act of Parliament, or by licence or Provisional Order granted in terms of the Electric Lighting Acts: Provided that this section shall not prevent any company or person from affording a supply of electrical energy to any other company or person where the business of the company or person affording the supply is not primarily that of the supply of electrical energy to consumers.' There is another proviso which I do not think is material for the present purpose.

"The agreement relied on is in clause 8 of an agreement dated December 31, 1901, made between the Birkdale Urban District Council of the one part and the company of the other part, and, so far as it is material, is in the following terms: 'The Council shall not, so long as the powers, duties, liabilities, and works authorised by the Order'—that is to say the Birkdale Electric Lighting Order, 1898—'are vested in the company, apply for any Act, Provisional Order, or licence under the Electric Lighting Acts or consent to the grant of an Act, Provisional Order, or licence, under such Acts to any person or persons, company or companies, in respect of the area of supply mentioned in the Order, or to the supply of electrical energy by any company, corporation, body, or person within such area of supply.' "

The action was tried before Eve J. on July 6, 7, 10, 1922.

On July 24, 1922, his Lordship delivered a considered judgment dismissing the action. After stating the facts he said: " The relators assert and insist that the Corporation in these circumstances are acting in breach of the contractual restriction against consenting to the supply of electrical energy in Birkdale in competition with the relators imposed upon them by the second indenture of December 31, 1901, and have instituted this action to obtain an injunction to stop further breaches of the agreement and to recover damages for those that have already been committed.

" The Corporation, on the other hand, deny that in the use for the working of their own tramways of electrical energy generated by themselves they can in any sense be said to be supplying electrical energy. They argue that in order to constitute a supply of energy there must be two parties, the one who gives and the other who takes.

" The primary meaning of the verb ' to supply ' is I think to give or furnish something that is wanted, and undoubtedly in that sense it can be construed in all the relevant places in which it is used in the Acts and Orders I have to consider. In that construction there is little, if anything, to distinguish it from the verb ' to provide,' and in cases where a local authority are themselves the undertakers, inasmuch as their statutory powers include a power to supply electricity for public purposes—that is (inter alia) for lighting any street or any place belonging to the local authority—the verb ' to supply ' would certainly appear to be used in reference to a state of facts which does not involve the transfer of electricity from one who gives to the other who takes, unless it can be said that the local authority as electricity undertakers are to be treated as a separate entity from the same authority as owners or controllers of the lamps in streets and places belonging to them. Apart from authority I should have felt some doubt in holding that a corporation generating and providing electrical energy for the working of tramways owned by the corporation is not supplying electricity for private purposes within the meaning of the Electric Lighting Acts, 1882 to 1909, and of the restrictive clause of the second indenture of December 31, 1901. But in *West Surrey Water Co.* v. *Guardians of Chertsey Union* (1) North J. in circumstances involving an alleged invasion of the plaintiff company's monopoly of supply had to consider the meaning of the word 'supply' in relation to water in the Public Health Act, 1875, and he attached a construction to it which would appear to exclude all cases where the supplier and consumer are the same body and where the commodity is provided, not for persons in the area who require a supply but for use by the suppliers for their own purposes. In the course of his judgment he says (2) 'What is "supply"? "Supply" I understand to mean the passing of water from persons who have it to persons who want it. I do not see how it could be said that supply of water means supplying "yourself" in the natural meaning of the words,' and further on he says (3): 'As I read these sections, they relate to waterworks for the supply of water, meaning to the persons who require the supply of water in the district, and not meaning to refer to what is merely taking water for the purposes of the body itself—for its own purposes, as distinguished from supplying it to other persons.' I think the result of that judgment is to impress on the word 'supply' in Acts and Orders of the nature of those with which I have here to deal a meaning which compels me to hold that the plaintiffs here have no cause of action, and this being so I have no alternative but to dismiss this action with costs."

The plaintiffs appealed. The appeal was heard on January 17, 18, 19, 1923.

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(1) [1894] 3 Ch. 513.

(2) [1894] 3 Ch. 516.

(3) [1894] 3 Ch. 518.

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Maugham K.C. and *A. Guest Mathews* for the appellants.

Tomlin K.C. and *H. C. Bischoff* for the respondent corporation.

Cur. adv. vult.

The arguments sufficiently appear from the judgments.

March 23. The following written judgments were delivered :—

LORD STERNDALE M.R. This is an appeal from a judgment of Eve J. in favour of the defendants in an action brought by the Attorney-General on the relation of the Birkdale District Electric Supply Company, Ld., in the following circumstances. The Attorney-General is a party because the interests of the public are concerned, but the parties really interested are the Birkdale District Electric Supply Company, and I propose to speak of them as the plaintiffs. They, by virtue of an assignment dated December 31, 1901, were transferees of the powers, duties, and liabilities of the Birkdale Urban District Council under an Electric Lighting Order of 1898, and also lessees of an electrical generating station. They were, under a second agreement of December 31, 1901, bound to supply electrical energy for public and private lighting within the district, and for working any electrical tramways owned by the Council in the district. The Birkdale Urban District Council owned tramways which were in lease to the Southport Tramways Company for thirty-five years, and that company were prohibited by the lease from taking electrical energy from any one except the plaintiffs. The supply from the plaintiffs was regulated by an agreement of November 7, 1902.

The second agreement of December 31, 1901, already mentioned, contained the following clauses. Clause 1 : " This indenture shall be construed as supplemental to the said indenture or deed of transfer, and shall have the same force and effect as if the provisions hereof were included therein, and all expressions used in this indenture shall have the same meaning as if this indenture and the said indenture of transfer

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were one instrument." Clause 3: "The company shall generate within the urban district of Birkdale all electrical energy required for public and private lighting under the Order, and for working any electrical tramways owned by them in the same district." Then there is a provision as to the lease of the generating station. Clause 8: "The Council shall not"—that is the urban district council—"so long as the powers, duties, liabilities and works authorised by the Order are vested in the company apply for any Act, Provisional Order, or licence under the Electric Lighting Acts, or consent to the grant of an Act, Provisional Order, or licence under such Acts to any person or persons, company, or companies, in respect of the area of supply mentioned in the Order, or to the supply of electrical energy by any company, corporation, body or person within such area of supply, and shall in every way assist the company at the cost of the company in opposing the grant of any such powers but no objection shall be taken to any other provisions of this indenture for want of mutuality on the ground that this covenant exceeds the powers of the council."

The Birkdale urban district adjoined the borough of Southport, and the tramways in the borough belonging to the defendants and those in the Birkdale urban district ran in a continuous line, joining one another at the boundary of the urban district and the borough. The electrical energy for the purpose of working the continuous line of tramways was provided by the plaintiffs up to this boundary, and beyond it by the borough. This was the state of things up to April 1, 1912, when the boundary of the borough was altered by statute so as to include the Birkdale urban district. In February, 1918, the Southport Tramways Company surrendered their lease to the corporation, who thereupon came into possession of the whole line of tramways. On the surrender the agreement of February 7, 1902, came to an end, and a fresh agreement to substantially the same effect was made between the plaintiffs and the defendants, terminable, however, on three months' notice by either party. On

August 10, 1921, the corporation gave the stipulated three months' notice, and on November 10, 1921, the apparatus by which the plaintiffs had supplied energy for the tramways within the urban district was removed. From that date the defendants have provided the energy necessary for working the whole line of tramways.

The Southport Extension Order, 1911 (confirmed by 1 & 2 Geo. 5, c. clxxxv.), provided in Art. XI. (3.) (*c*) that: "The provisions of the Electric Lighting Orders Confirmation (No. 2) Act 1891 so far as that Act relates to the Southport Electric Lighting Order 1891 shall not extend and apply to that part of the Borough which comprises the area of supply under the Birkdale Electric Lighting Order 1898 (confirmed by the Electric Lighting Orders Confirmation (No. 8) Act 1898) until such date as the Corporation become the undertakers under the last-mentioned Order and until that date all powers rights and duties of the Urban Council existing at the commencement of this Order under the said Birkdale Electric Lighting Order 1898 or under any agreement made in connexion therewith shall vest in and attach to the Corporation of the Borough and a reference to the Corporation of the Borough shall be substituted for any reference therein to the Urban Council. . . . ." Art. XV. provided: "(1.) Any action or proceeding or any cause of action or proceeding which at the commencement of this Order is pending or existing by or against the Urban Council in relation exclusively to any part of the added areas shall not be in anywise prejudicially affected by reason of the making of this Order but may be continued prosecuted and enforced by or against the Corporation of the Borough. (2.) Anything duly done or suffered and all contracts deeds bonds agreements and other instruments (subsisting at the commencement of this Order) entered into or made by the Urban Council or their predecessors in relation exclusively to any part of the added areas shall be of as full force and effect against or in favour of the Corporation of the Borough and may be continued and enforced as fully and effectually as if instead of the Urban Council or their predecessors the

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Corporation had done or suffered the same or been a party thereto."

The Electric Lighting Act, 1909, s. 23, enacts as follows: [His Lordship read the section and continued:] The plaintiffs contend that the defendants are prohibited from supplying energy to that part of the tramway undertaking which lies within the old urban district, either by the clause of the agreement of December 31, 1901, which I have mentioned, or by s. 23 of the Electric Lighting Act of 1909, and claim a declaration to that effect, and an injunction. The defendants deny that their action is prohibited, either by the agreement or by the section, and the main ground of their defence is based upon the contention that a providing of energy for themselves to their own tramways is not within either the agreement or the section, and that "supply" to be within either of those documents must be a supplying by one person to another necessitating two parties, a supplier, and a supplied. Eve J. has upheld the defendants' contention rather, as it would appear, against his own opinion, on the authority of a decision of North J. in *West Surrey Water Co.* v. *Guardians of Chertsey Union.* (1) With respect to the learned judge, I cannot see that the case to which he refers is any authority which governs that before us. It is upon a different Act, and all the provisions and circumstances of that case are so distinct from the present that I do not think the reasoning of North J. affords any guide to our conclusion. It is therefore, I think, necessary to examine the provisions of the relevant documents independently in order to form an opinion upon their meaning. I agree with Eve J. that the main question turns upon the meaning of the word "supply," and I think it is clear that it cannot be said that there is one well-known meaning of that word which must be adopted on all occasions, but that the meaning must be governed by the circumstances and the context in which it is used.

Although it is not the order in which the matter was argued before us, I propose to deal first with s. 23 of the Electric

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Lighting Act, 1909. I have already read the section, and I need not repeat it. By s. 3 of the Electric Lighting Act, 1882, with which the Act of 1909 is to be construed, public and private purposes for which a local authority, company, or person may supply electricity are defined in this way. Sub-s. 3: "'Public purposes' shall mean lighting any street or any place belonging to or subject to the control of the local authority, or any church or registered place of public worship, or any hall or building belonging to or subject to the control of any public authority, or any public theatre, but shall not include any other purpose to which electricity may be applied." Sub-s. 4: "'Private purposes' shall include any purposes whatever to which electricity may for the time being be applicable, not being public purposes, except the transmission of any telegram." By s. 4 the Board of Trade are empowered by Provisional Order to authorize any local authority to supply electricity for any public or private purpose within any area. In 1891 the defendants obtained such an Order (confirmed by 54 & 55 Vict. c. l.), and clauses 4, 5 and 6 of that Order are as follows. Clause 4: "Subject to the provisions of this Order the Undertakers for the purposes of this Order shall be the Mayor Aldermen and Burgesses of the borough of Southport." Clause 5: "Subject to the provisions of this Order the area of supply shall be the whole of the area included in the First Schedule which said area is more particularly delineated upon the deposited map and thereon coloured red." Clause 6: "Subject to the provisions of this Order and the principal Act the Undertakers may supply energy within the area of supply for all public and private purposes as defined by the said Act provided as follows: (1.) Such energy shall be supplied only by means of some system which shall be approved in writing by the Board of Trade and subject to such regulations and conditions for securing the safety of the public and for insuring a proper and sufficient supply of energy as the Board of Trade may impose; and (2.) the Undertakers shall not without the express consent of the Board of Trade place any electric line above ground except within premises in the sole occupation or control of the

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Undertakers and except so much of any service line as is necessarily so placed for the purpose of supply; and (3.) the Undertakers shall not permit any part of any circuit to be connected with earth except so far as may be necessary for carrying out the provisions of any such regulations and conditions as aforesaid unless such connexion is for the time being approved of by the Board of Trade with the concurrence of the Postmaster-General and is made in accordance with the conditions (if any) of such approval."

The defendants argue that such an Order was quite unnecessary to enable them to provide electricity for their own purposes, and that when so providing electricity they are not acting under the provisions of the Order at all. I cannot agree with such a construction. Power is given to the defendants to supply for public purposes, for example lighting streets, which is a providing for their own purposes, and to enable them to do this, amongst other things, they are given the power to break up streets and do other things which without the Order they could not do. (See clause 8 of the Order.) It cannot in my opinion be argued that they have not these powers when they are providing energy for lighting streets or public buildings belonging to themselves, and if they have them it is only because in exercising them they are supplying energy within the meaning of the Order. I think it quite clear in this Order "supply" is used in its most general sense of provide and not in the restricted sense of supplying to a person distinct from the supplier. I think in what the defendants are doing here they are supplying energy under the powers of the Order which they obtained, and that the word "supply" cannot have the restricted meaning of supplying to some person other than themselves. This, however, does not decide the question, because it is contended by the defendants that whatever be the meaning of the word in the Electric Lighting Order, in s. 23 of the Act of 1909 at any rate it can only have that restricted meaning and cannot be held to include what was called a domestic provision, for example, the lighting of a house belonging to a private individual by means of an installation in his own yard for that purpose alone, or of a public building by a corporation by means of an installation for that purpose alone in the building or in its grounds. I do not think it is necessary to decide whether these hypothetical instances would or would not be held to be a supply within the meaning of the section or not. It may well be they would not, and it will be noticed that a Provisional Order would not be necessary to authorize such a provision of energy. But that is not what the defendants are doing here. They are making it part of their business to supply energy under the powers of the Order which authorized them to supply (using that word) for public purposes, that is for their own purposes in some instances, and I see no reason why supply in s. 23 of the Act of 1909 should have a different meaning from that which it bears in the Electric Lighting Act, 1882, with which it is to be construed. I do not think the proviso to the section in any way affects this conclusion.

There remains however another contention of the defendants, that is that though they may be supplying energy in an area within which other undertakers, namely the plaintiffs, are granted the right to supply, they are authorized to do so by Act of Parliament, that is, by ss. 42, 63 and 64 of the Southport Extension and Tramways Act, 1900 (63 & 64 Vict. c. lxvi.). These sections are as follows. Sect. 42 is : "Notwithstanding anything to the contrary contained in the Tramways Act 1870 or in any other Act or Order the Corporation may place and run carriages on and may work any tramways tramroads or light railways for the time being belonging to or in lease to the Corporation or on which they may have any powers to place or run carriages whether within or beyond the borough and may take and demand tolls and charges in respect of such tramways tramroads or light railways and of the use of carriages thereon and the Corporation may reconstruct or alter such tramways tramroads or light railways and may provide all such buildings cars rolling stock engines machinery electric and other plant apparatus and appliances horses and stables as they may deem requisite or convenient for the working or user by the Corporation of the tramways tramroads or light railways by animal or mechanical power and may sell or dispose of or exchange such of the before-mentioned articles and things as from time to time may no longer be required." Sect. 63 is: "Where the local authority for any district adjacent or in proximity to or in the neighbourhood of the borough or the assigns of such local authority desires to be supplied with electrical energy by the Corporation such local authority being or having been authorised to supply electrical energy under the provisions of the Electric Lighting Acts 1882 and 1888 the Corporation may with the approval of the Board of Trade enter into and carry into effect agreements with any such local authority or their assigns for the supply of electrical energy in bulk to such local authority or their assigns and the Corporation may with the approval of the Board of Trade raise money for such purpose under the provisions of the last-mentioned Acts." Then s. 64 is: "The Corporation on the one hand and any tramway or tramroad company or any company authorised under the Light Railways Act 1896 to construct a light railway and respectively having power to use electrical energy for traction purposes partly within and partly without the borough on the other hand may from time to time enter into and carry into effect an agreement for and in relation to the supply of electrical energy by the Corporation to such company for all or any purposes for which such company are empowered to use the same Provided that the Corporation shall not supply electrical energy in any district without the borough except with the consent of any local authority company or person who shall be supplying electrical energy in such district under statutory authority." Then there is a proviso which is not relevant to this case. I think it is only necessary to read ss. 63 and 64 to see that they have no application to what has been done in this case. Sect. 42 however requires more consideration. The argument as I understand it is that as the defendants are empowered by that section to work tramways beyond the borough and to erect such electric and other plant and apparatus as may be requisite and convenient for such working, they must by implication be authorized to supply electrical energy for that purpose beyond the borough in any area to which the tramways may penetrate, although it is the area of supply allotted to other undertakers. I do not think the section bears such an interpretation. It is a general authority to the corporation to work tramways beyond as well as within the borough by various means, of which electricity is one. It says nothing directly about the supply of electrical energy, and, if it implies a power to work tramways beyond the borough by electrical energy supplied by the defendants, there is no necessary implication that a supply for that purpose is to be made free from all the provisions and restrictions which otherwise apply to the supply of electrical energy. In my opinion therefore what the defendants are doing is a violation of the provisions of s. 23 of the Act of 1909, and the plaintiffs are entitled to a declaration such as they ask and if necessary an injunction. In the view which I take it is not necessary to decide whether the plaintiffs are entitled also to a declaration and injunction by reason of the agreement which I have mentioned, and I say no more about that part of the case than that as at present advised I see considerable difficulties in the way of the plaintiffs establishing their right to judgment on that ground. The appeal must be allowed with costs here and below.

WARRINGTON L.J. stated the facts as above set out and continued: Eve J. has decided, contrary, as I gather, to his own opinion, but following the opinion expressed by North J. in *West Surrey Water Co.* v. *Guardians of Chertsey Union* (1), that both in the Act and in the agreement the word "supply" does not extend to the provision by the corporation of energy for the working of its own tramways, whether within the company's area of supply or not, and accordingly that the corporation are not doing that which is prohibited by the Act of Parliament, or committing any breach of the agreement, and that the action therefore fails.

I propose to deal first with the construction of the Act of 1909. It is provided by s. 27 that this Act, and the Electric Lighting Acts, are to be construed together as one Act and

(1) [1894] 3 Ch. 513.

to be cited as the Electric Lighting Acts, 1882 to 1909. There are some material provisions in the Act of 1882 to which reference should be made. Sect. 3 provides that the Board of Trade may license a local authority, company, or person to supply electricity for any public or private purpose subject to the provisions of the Act. "Public purposes" are to include the lighting of streets, and (speaking generally) public buildings, but not any other purpose to which electricity may be applied. "Private purposes" are to include any purposes whatever to which electricity may for the time being be applicable, not being public purposes. To supply energy for working tramways is, therefore, to supply it for a private purpose, whether the tramways belong to a public body or not: see s. 3, sub-ss. 3 and 4. Sect. 4 provides that the Board of Trade may by Provisional Order authorize any local authority, company, or persons to supply electricity for any public or private purpose within any area. Now in this section it is clear that in the case of a local authority the word "supply" includes the provision of electricity for lighting streets, and so forth, although they may belong to, or be under, the control of the local authority, and is not confined to the transmission of electricity by the local authority to some other person. Bearing this in mind, I turn to s. 23 of the Act of 1909. The defendants contend that in this section, at all events, "supply" means, and means only, the transmission of electricity by the authority, company, or person referred to to some other authority, company, or person, and that as the corporation are using their own electricity for a purpose of their own they are not supplying it within the meaning of the section. I cannot adopt this construction. If, as I think is the case, "supply" in s. 4 of the Electric Lighting Act, 1882, includes, as it clearly does, the provision of energy for street lamps, public buildings, and so forth, owned and controlled by the supplying authority, I can see no reason for giving it a different meaning in s. 23 of the Act of 1909. Moreover, taking the section by itself, I should be of the same opinion—namely, that by what they are doing the corporation are supplying electricity within the meaning of the section. In my judgment a local authority acting under a Provisional Order as the corporation is acting is making the supply of electricity a part of its business as such authority, and is as much "supplying" itself in its capacity of tramway owner as it is supplying those persons who take and pay for the electricity in the ordinary way. But it is said that the provision seems to recognize the right of companies or persons to supply electricity for their own use, and even to supply it to others under the circumstances there mentioned. I think it does, but this in no way affects the view I have expressed above, which is that a body acting as the undertakers, under Parliamentary authority, is supplying electricity within the meaning of the Act none the less that the business for which it is used is under its own control. But it is contended, further, that the supply is authorized by Act of Parliament, and in support of this contention reliance is placed on certain sections of the Southport Extension and Tramways Act, 1900. The first of these is s. 42. I need not read it, as it has just been read by the Master of the Rolls. This section is one which is intended to confer on the corporation, as the local authority of Southport, the power of working tramways without as well as within the borough. It says nothing in terms about the supply of energy, and though it may well be that it is within their powers as a corporation to work tramways outside the borough with energy provided by themselves, it does not follow that they are authorized to supply that energy in another area of supply within the meaning of the Act of 1909. I think the words there point to an express authority, or one arising by necessary implication, to supply or distribute within the particular area. The other sections mentioned are ss. 63 and 64. Sect. 63 gives power to supply electrical energy in bulk to other local authorities, and has no bearing on the question. Sect. 64 authorizes the corporation to make agreements for the supply of energy to tramway and light railway companies. This does not confer any such authority as is required in the present case. It, however, contains a proviso that the corporation shall not supply electrical energy in any district without the borough, which did not then include the plaintiff company's area, except with the consent of any local authority, company, or person who shall be supplying electrical energy in such district under statutory authority. This seems to me to confirm my view that s. 42 cannot be regarded as authorizing the disputed supply within the meaning of the Act of 1909.

On the construction of the Act of Parliament, therefore, I am of opinion that the plaintiffs are entitled to succeed, and it becomes unnecessary to consider whether the corporation are, under the agreement, also debarred from doing what they claim the right to do. As to this, I will only say that as at present advised I am not satisfied that supplying electricity themselves is within the terms of the agreement whereby their predecessors (to whose obligations the corporation succeed) bound themselves not to consent to the supply by other people.

As to the dictum—for it is no more than that—of North J. above referred to, it, in my opinion, affords no guidance in the present case. It was uttered in reference to different statutory provisions, and in reference to totally different circumstances; I feel some difficulty in understanding why Eve J. felt himself bound by it.

In my opinion the appeal ought to be allowed, and judgment given for the appellants for a declaration substantially in accordance with the claim of the amended statement of claim, but the exact terms require some consideration. Probably, seeing the position of the defendants, an injunction would not be necessary, but there should be liberty to apply. The appellants must have the costs here and below.

YOUNGER L.J. I have had the privilege of reading the judgments just delivered by my Lord and the Lord Justice, and I concur very respectfully in the conclusion which they have reached. For myself I think, perhaps, more of the appellants' case under the agreement than does my Lord, but being in entire accord as to their rights under the statute, it is unnecessary for me further to discuss that question. I think, with the other members of the Court, that this appeal should be allowed.

Appeal allowed.

Solicitor for appellants: *Sydney Morse.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for J. Ernest Jarratt, Southport.*

W. I. C.

In re COURCIER AND HARROLD'S CONTRACT.

[1922. C. 5376.]

SARGANT J.
1923
March 2, 8, 9.

Vendor and Purchaser—Conditions of Sale—Misdescription—Restrictions affecting Property not fully stated—Materiality—"Error, misstatement or omission."

By an agreement dated September 28, 1922, a freehold residence was contracted to be sold subject to the conditions of sale on which the property had been previously offered for sale by auction. These conditions consisted of certain special conditions and the general conditions known as the London Conditions of Sale.

By Condition 7 of the special conditions the property was sold subject to the following restrictions and stipulations: "That neither the land or (*sic*) any existing or future building thereon should be used for carrying on any trade or business nor as a school hospital nursing home public workshop or otherwise than as a private dwelling house but not precluding the practice of a profession thereon."

By a mistake some words had been omitted from this statement of the restrictions. Instead of the words "public workshop" the restrictions should have read "or public institution or charity nor for holding public meetings nor for public worship."

Condition 6 of the general conditions contained the following provision: ". . . . If any error, misstatement or omission shall be discovered in the particulars, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof."

The purchaser took the objection that the restrictions had not been sufficiently disclosed:—

Held (1.), that the restrictions to which the property was subject had been sufficiently disclosed in the conditions; and (2.) that even if they had not, the mistake was "an error misstatement or omission" within the general condition, and the purchaser was not entitled to require the release of the omitted restrictions.

VENDOR AND PURCHASER SUMMONS.

By a contract dated September 28, 1922, the vendor Ronald

L. Courcier agreed to sell and the purchaser J. Blake Harrold to purchase a freehold detached residence known as Flint Cottage, Mount Ephraim Lane, Streatham, for the sum of 1800*l.*, subject to the conditions contained in the particulars and conditions of sale under which the property had previously been offered for sale by auction.

By Condition 1 it was provided that the property was sold subject to the special conditions there set out and also to the London Conditions of Sale.

Condition 7 of the special conditions was as follows: "The property is subject to the restrictions and stipulations following—namely: (*b*) That neither the land or (*sic*) any existing or future building thereon should be used for carrying on any trade or business nor as a school hospital nursing home public workshop or otherwise than as a private dwelling house but not precluding the practice of a profession thereon."

This condition misstated the terms of the restrictions to which the property was subject. The property had been conveyed by an indenture of conveyance on sale dated May 8, 1913, and the then purchaser had entered into a covenant for the benefit of the adjoining part of an estate known as the Mortimer Estate to the following effect: "Neither the land hereby conveyed nor any existing or future building thereon shall be used for carrying on any trade or business nor as a school hospital nursing home or public institution or charity nor for holding public meetings nor for public worship or otherwise than as a private dwelling house but this stipulation shall not preclude the practice of a profession thereon."

The purchaser in his requisitions on title took the objection that he had no notice when he entered into the contract that the property could not be used as an institution or charity nor for holding public meetings thereon, and he required the release of these covenants or that the property should be discharged from these obligations in accordance with the contract for sale.

It was not possible for the vendor to obtain a release of these restrictions otherwise than at great expense, if at all, inasmuch as other adjoining properties had been sold subsequently to the conveyance of May 8, 1913, by the common vendor subject to similar restrictions. Condition 6 of the London Conditions of Sale contained the following provision: " . . . . The property is believed to be correctly described as to quantity and otherwise. If any error, misstatement or omission shall be discovered in the Particulars, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof."

This summons was taken out by the vendor asking for a declaration that the particulars and conditions of sale contained sufficient notice to the purchaser of the restrictions and stipulations relating to user to which the property agreed to be sold was subject, and that the vendor was not bound to comply with the purchaser's requisitions and obtain a release of the property from the restrictions or stipulations omitted from the conditions of sale.

Greene K.C. and *R. J. A. Morrison* for the vendor. There was here a sufficient disclosure made by the conditions of sale to the purchaser. The omissions from the actual restrictions make no difference, because they are all involved in the provision that the premises should not be carried on otherwise than as a private dwelling house. A house which could only be used as a private dwelling house could not be used as a "public institution or charity nor for holding public meetings nor for public worship." These words were superfluous, and the purchaser will be receiving what he agreed to purchase without any release of these provisions being obtained: see *Flight* v. *Booth* (1); *Rolls* v. *Miller.* (2) Here there was no misdescription, but a statement in a compendious form of all the restrictions.

Rolt K.C. and *A. Adams* for the purchaser. The vendor has sold a house subject to certain specified encumbrances, and when it appears that there are further encumbrances which were not told to the purchaser seeks to say that on

(1) (1834) 1 Bing. N. C. 370, 376.

(2) (1884) 27 Ch. D. 71, 87.

their construction they involve no increased burden. If this was perfectly clear on the face of it, the Court might be able so to hold, but the Court will hesitate to decide on such a summons as this, that the purchaser if he completed could not be restrained under the words of the restrictions from doing something that he could not have been restrained from doing had the restrictions as stated in the conditions been correct. It is possible here to indicate matters in which the full restrictions will fetter the purchase, although the form of them in the conditions would not have done so. It would not be a breach of the provision that the premises should be used as a private dwelling house only to hold a political meeting in the house or garden. It would be a breach to make a habit of doing so, but these additional words would entitle the neighbours to complain of an occasional or even a single meeting. So too it would be a breach of the provision against holding a public meeting to hold an auction of the furniture belonging to the house on leaving, although that is not a breach of a covenant to use as a private dwelling house only: *Reeves* v. *Cattell.* (1)

[SARGANT J. It is for the Court to decide this question of construction between vendor and purchaser: *Alexander* v. *Mills.* (2)]

There a matter of title was being decided and the decision could have been used against a subsequent purchaser. It will be no protection to the purchaser for the Court to declare that there was a sufficient disclosure to him of the restrictions. These restrictions are encumbrances: *Phillips* v. *Caldcleugh* (3); and if the omitted words constitute an additional encumbrance, however slight, the purchaser will not be compelled to accept the title: *In re Weston and Thomas's Contract* (4); *In re Higgins and Hitchman's Contract.* (5) This is especially so when the right to compensation is excluded as Condition 6 of the London Conditions excludes it here: see *Jacobs* v. *Revell.* (6)

(1) (1876) 24 W. R. 485.
(2) (1870) L. R. 6 Ch. 124, 131.
(3) (1868) L. R. 4 Q. B. 159, 162.
(4) [1907] 1 Ch. 244.
(5) (1882) 21 Ch. D. 95.
(6) [1900] 2 Ch. 858, 864.

Another example of the increased fetter imposed by the omitted words arises in the case of a gift of the premises by will or inter vivos for the purpose of a charity. The word "public" in the restrictions does not qualify "charity" as well as "institution". The gift might be to a private charity for the use of an injured officer. This would not be a breach of the provision against using the premises otherwise than as a private dwelling house, and yet it would be a user as a charity.

[SARGANT J. Is not the omission of a restrictive covenant an error, misstatement or omission within Condition 6 of the London Conditions ?]

It is submitted not. It is limited to physical misdescriptions, and, in any case, the defendant is not contending that the sale is to be annulled, but that as the property is subject to an undisclosed fetter, he can call upon the vendor to obtain its release. If the vendor cannot do this, then it will be for him to rescind the contract. This condition does not enable the vendor to force the purchaser to complete without compensation, but only prevents the purchaser setting up that the contract is invalid.

Greene K.C. in reply. There is no real difference between the restrictions, as set out in the conditions and the restrictions as they actually exist. Three examples have been given to show that the omitted words were not superfluous. As to the case of the gift to a charity, the words of the restrictions are directed against user and not ownership. There is nothing to prevent a charity owning the property, and if it allowed an invalided officer to reside there that would not be an infringement of the provision against user as a public charity. Further, it is a misuse of words to say that an auction of his furniture held by a man on leaving his house is a public meeting. Lastly, it would not be an infringement of the restrictions to hold a single public meeting; it is user for the purpose of holding public meetings that is aimed at, and this involves habitual user for this purpose. Such a habitual user would be a breach of the provision against using the premises otherwise than as a private dwelling house.

Again Condition 6 of the London Conditions will apply. The application of such a clause is not limited to physical misdescriptions: Williams on Vendor and Purchaser, 3rd ed., pp. 679, 682.

Sargant J. This is a curious case, and arises on a vendor and purchaser summons brought by the vendor asking in effect for a declaration that he has sufficiently disclosed the nature of the restrictions and stipulations by way of covenant to which the land agreed to be sold is subject. He also asks for a declaration that a good title has been shown to the land. [His Lordship then stated the facts and continued:] There are two questions that fall to be determined. The first is whether, notwithstanding the omission from Condition 7 of some of the words of the restrictive covenant, it was sufficiently disclosed to the purchaser. The second is whether in any case the omission of the words is not an "error misstatement or omission" within Condition 6 of the London Conditions of Sale.

On the first question, the purchaser alleges that certain things which he or his successors in title might conceivably desire to do are prohibited by the covenant as it exists, although they are not prohibited, or at any rate not so clearly prohibited, by the covenant as stated in the conditions. Two or three examples have been given of this. It is said that the full covenant, though not the stipulations set out in the conditions, might be violated by holding on the premises a political meeting in aid of some political candidate, or a bazaar in aid of some charitable object, or a sale of furniture. The other possibility suggested is that the covenant as it exists might prevent a gift of the property to a public charity and its use as a residence by some beneficiary of the charity.

In view of the principles laid down in *Alexander* v. *Mills* (1) it falls to me to construe the covenant, and as matter of construction I think that the word "public" in the expression "public institution or charity" must be treated as applying to "charity" as well as institution. The insertion of the word

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(1) L. R. 6 Ch. 124.

"or" before "charity" seems to indicate that; and this construction is rendered the more probable by the words that follow, "nor for holding public meetings nor for public worship," which go to show that this part of the covenant is directed exclusively to public activities. Now it seems to me that it would not be to use the property as a public charity for such a charity to own it and put some private person to reside there. If a number of persons were housed there with some one such as a matron to look after them, the position would be different, but such a user of the premises would, in my opinion, be repugnant to the covenant not only in its full form but as set out in the conditions. It would be a user "otherwise than as a private dwelling house."

I pass to the other examples suggested of a public meeting or auction. I am of opinion that the full covenant would not prevent the holding of a sale by auction in the house of furniture belonging to the house; and an auction of furniture brought into the house from outside for sale by auction there would, according to the view expressed by Sir George Jessel in *Reeves* v. *Cattell* (1), be a breach of the covenant not to use premises "otherwise than as a private dwelling house."

Take again the case of a philanthropic bazaar. The question whether it would be a breach of covenant to hold it in the garden of this property is one entirely of degree. If a single bazaar were held—or, possibly, two in the course of a year—I do not think that could be said in any ordinary sense of the words to be a user of the premises for holding public meetings, while, on the other hand, if the owner of the property habitually used it for holding bazaars, that would be a breach of the covenant not to use it "otherwise than as a private dwelling house." The same is the position with regard to political meetings. It would be very odd in the case of a dwelling house of this kind that a meeting should be held there to which the public were admitted indiscriminately, but in this case too a single user for this purpose would not be a breach of the full covenant, and to make a practice of holding public meetings there would be a breach of the

(1) 24 W. R. 485.

covenant not to use the property "otherwise than as a private dwelling house."

On the first question therefore I have come to the conclusion, that there is in practice no difference between the covenant in its full form and the covenant as stated in the conditions of sale. I cannot imagine any really practical case in which their application would differ. I decide this point therefore in favour of the vendor.

But I have also to consider whether, even if there was some difference between the covenant as it stands and the covenant as stated in the conditions, the vendor is not protected by the provision in the sixth of the London Conditions of Sale that: "If any error misstatement or omission shall be discovered in the Particulars, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof." It is true that the imperfect statement of the stipulations affecting the property is not contained in the particulars but in the conditions of sale; but counsel for the purchaser have not placed any reliance on that, and I think wisely. I do not think there is anything in that. This general condition cannot be construed so narrowly as to exclude from its purview omissions in the part of the document under which the sale was effected divided off and headed "Conditions of Sale."

The chief question on this part of the case is whether the "error misstatement or omission" that is alone contemplated is some physical misdescription of the property. As the argument proceeded, I came more and more to the conclusion that so to hold would be to take too narrow a view; and I am glad to find that in Williams on Vendor and Purchaser, 3rd ed., p. 682, the law is stated in this way: "The common form of this condition provides for allowing compensation if any error, misstatement or omission, be discovered in the particulars of sale; and it appears that these words are applicable (with the limitations above mentioned)"—that is, the limitation that the property must not be an entirely different property from that agreed to be sold—"to an error or misstatement made in the particulars with regard to a

SARGANT J.

1923

COURCIER AND HARROLD'S CONTRACT, *In re.*

matter of right as well as of physical content." Assuming then that there was in the present case an error, misstatement or omission as to the fetter on the user of the property, this passage shows that the condition is wide enough to cover it; and the only remaining question is whether as a result of the error, misstatement or omission in the conditions the purchaser believed himself to be purchasing a property so different from what it really is that he can refuse to complete. I use the words "refuse to complete" for this reason. What the purchaser is asking is that the covenant should be modified so as to be in accordance with the statement of it contained in the conditions. But it appears from the affidavit of the vendor's solicitor that: "It is not possible for the vendor to obtain a release of the particular restrictions and stipulations in question otherwise than at a great expense, if at all, inasmuch as other properties in Mount Ephraim Road have been sold subsequently to the said conveyance of the 8th day of May 1913 by the common vendor subject to restrictions and stipulations similar to those imposed by that conveyance." It seems to me that from a practical point of view the statement of the vendor's solicitor is, if anything, an understatement. I should say that in the circumstances described it is practically impossible to obtain the modification of the covenant suggested, so that the real question involved is whether the purchaser can refuse to complete.

Now will the contract of sale really be modified to the detriment of the purchaser if he has to take the property subject to the full restrictions? Is there such a discrepancy between the restrictions in their full form and the restrictions as set out in the conditions that the general condition as to any error, misstatement or omission ought not to be applied? In *Flight* v. *Booth* (1) there was a provision that any error or misstatement should not vitiate the sale but that compensation should be paid. It was held that the restrictions on the user of the property being sold as stated in the particulars of sale were so different from the actual restrictions that to force the property on the purchaser would be to force on him something substantially different from the property he had agreed to buy. The condition giving compensation only for misdescription was held not to apply, and it would be an a fortiori case where as in the present case there was a provision that no compensation was to be paid. Tindal C.J. said: "The question, therefore, is narrowed to the single point, whether the misdescription in the printed particulars of sale of the premises to be sold was such as to entitle the purchaser to rescind the contract altogether; or whether it was such as was contemplated by the sixth condition of the printed particulars of sale. . . . It is extremely difficult to lay down from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases." He then referred to the conflicting authorities and continued: "In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation." In that case the leasehold premises had been described so as to lead to the conclusion that there was nothing to prevent any trade being carried on on the premises except those which were of an offensive nature. There were in fact provisions preventing the use of the premises for a large number of different businesses. It was held that there was such a material discrepancy between the particulars and the lease as to entitle the purchaser to rescind the contract.

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(1) 1 Bing. N. C. 370, 376.

The rule suggested in that case seems to afford a reasonably satisfactory business test at any rate as applied to a case like the present, which seems to me to be very far from the dividing line. Could it be said that any person proposing to buy this house would have been dissuaded from doing so if, instead of the shorter form of restrictions set out in the conditions of sale, the full restrictions had been set out? In my judgment, in any possible view as to the discrepancy between the restrictions as there stated and the restrictions as they in truth exist, it is impossible to suppose that a purchaser willing to buy subject to the conditions of sale would have been unwilling to buy if the restrictions had been fully set out. The discrepancy is of a trifling description and would at the most have been a subject for compensation, had the conditions provided for compensation for misdescription as in *Flight* v. *Booth.* (1) Here the provision that no compensation is to be paid applies, and I must hold that a good title has been shown in this respect. I have carefully considered the question of costs, and as the trouble arose through the carelessness of the vendor and the purchaser had some ground for being dissatisfied, I will make no order against the purchaser for costs.

Solicitors for vendor: *Shelton & Co.*
Solicitors for purchaser: *Leslie Williams & Alder.*

(1) 1 Bing. N. C. 370.

H. C. G.

ASTBURY J.

1923

April 24.

CHILLINGWORTH *v.* ESCHE.

[1922. C. 4973.]

Vendor and Purchaser—Deposit—Conditional Agreement—" Subject to a proper contract "—Proper Contract tendered by Vendor—Refusal of Purchasers to proceed—No firm Contract—Recovery of Deposit.

By a document of July 10, 1922, the purchasers agreed to purchase a nursery from the vendor " subject to a proper contract to be prepared by the vendor's solicitors " and acknowledged having paid 240*l.* " as deposit and in part payment of the said purchase money." Completion was fixed for November 2. The purchasers signed the document and the vendor added and signed a receipt for the deposit confirming the sale.

A proper contract was subsequently prepared by the vendor's solicitors, approved by the purchasers' solicitor, executed by the vendor, and tendered to the purchasers for execution. The purchasers however refused to sign it, declined to proceed with the transaction, and claimed the return of the deposit:—

Held, assuming (without deciding) that the document of July 10, 1922, was only conditional, and did not constitute a firm contract, that the purchasers were not in the circumstances entitled to recover the deposit, which was a guarantee that they would proceed with the transaction on the vendor tendering a proper contract.

Moeser v. *Wisker* (1871) L. R. 6 C. P. 120; *Howe* v. *Smith* (1884) 27 Ch. D. 89; and *Thomas* v. *Brown* (1876) 1 Q. B. D. 714 applied.

Lloyd v. *Nowell* [1895] 2 Ch. 744 distinguished.

ACTION.

By a document signed on July 10, 1922, the plaintiff purchasers agreed to purchase from the defendant vendor for the sum of 4800*l.* " subject to a proper contract to be prepared by the vendor's solicitors " all his freehold land and nursery at Cadmore Lane, Cheshunt, Herts, together with the fifteen glasshouses and all other buildings, erections, engine and fixed plant thereon including all rolling stock and utensils connected with the business " a schedule of which has been prepared and signed by both parties " ; and acknowledged having paid that day, July 10, 1922, the sum of 240*l.* " as deposit and in part payment of the said purchase money." Completion was fixed for November 2, 1922, when vacant possession was to be given. The vendor was to leave at least one man in charge of the nursery up to the said day of completion.

The purchasers signed this document and the vendor added and signed the following confirmatory receipt: "I hereby confirm the above sale and acknowledge receipt of deposit of 240*l*. above mentioned." A footnote stated: "Balance purchase money 4560*l*."

On the same day the vendor signed and gave the purchasers the following additional receipt: "Received of [the purchasers] July 10, 1922, the sum of 240*l*. being deposit and part payment of the sum of 4800*l*. on sale of my nursery Cadmore Lane, Cheshunt, as per agreement entered into this day July 10, 1922. Balance of purchase money being 4560*l*."

A schedule of trade utensils was signed on the same day. It was headed "Schedule of utensils in trade at [the vendor's] nursery Cadmore Lane Cheshunt Herts under agreement for sale to [the purchasers] dated this day July 10, 1922." Then followed three pages of utensils with the following note at the foot signed by the purchasers and vendor: "We agree this to be the schedule referred to in the sale agreement between us dated July 10, 1922."

On August 1, 1922, the vendor's solicitors sent a proper formal contract for approval, and after certain alterations it was finally approved by the purchasers' solicitor on September 23, with an intimation that he was engrossing his part. The vendor's engrossment was signed on September 28, but the purchasers did not sign their engrossment, and on October 12 their solicitor wrote: "I regret to say that my clients do not feel disposed to proceed with the negotiations in this matter. I should therefore be glad to receive cheque for the deposit."

The vendor's solicitors took the view that there was a binding contract and did not return the deposit.

On November 14, 1922, the purchasers commenced this action for a declaration that there was no binding contract and for return of the deposit, submitting that the agreement of July 10, 1922, was conditional on a proper contract being prepared and signed by both parties, which had not been done.

The vendor did not admit that the agreement was conditional in this way. He relied on the proper contract approved by both sets of solicitors which he had always been and was still willing to complete and had pressed the purchasers to complete. He was also willing to waive the condition as to the preparation of a proper contract, which he said was only inserted for his benefit, and to complete the contract of July 10, 1922, as it stood. He did not counterclaim for specific performance.

The first question was whether the first document of July 10, 1922, constituted a binding contract or was only conditional on a proper contract being executed. This point was elaborately argued, but not decided.

The second question was whether, assuming that there was no binding contract, the purchasers were in the circumstances entitled to recover their deposit. This point alone is reported.

Luxmoore K.C., *Lionel Cohen* and *Wynn Parry* for the purchasers. Assuming that there is no binding contract the purchasers are entitled to the return of the deposit, which was paid only on the basis of a conditional agreement that has come to nothing. In *Lloyd* v. *Nowell* (1) the vendor was refused specific performance of a similar conditional agreement, and the purchaser recovered the deposit on his counterclaim.

An agreement [to enter into a future agreement is unrecognized in law and confers no rights on any of the parties : *Von Hatzfeldt-Wildenburg* v. *Alexander* (2) ; *Coope* v. *Ridout*. (3)

The solicitors could no doubt approve the terms of a formal contract. But they could not bind the purchasers to execute it as and when so approved. The purchasers could themselves have added fresh terms. Until a proper contract was signed

(1) [1895] 2 Ch. 744, 747.
(2) [1912] 1 Ch. 284, 289.
(3) [1921] 1 Ch. 291, 296, 297.

the whole matter remained in negotiation, and the purchasers were entitled to recede.

Micklem K.C. and *W. F. Webster* for the vendor. In *Lloyd* v. *Nowell* (1) the deposit was expressly paid "as conditional deposit." In other words it was conditional on the transaction going through. Here it was paid voluntarily and unconditionally "as deposit and in part payment" of the 4800*l.* purchase money.

Now a deposit has a twofold aspect. If the transaction goes through it is part payment. But it is also a guarantee, earnest, or arrha that the transaction shall go through, and if it goes off by the payer's default he cannot recover it, though it would be taken into account against a loss on resale: *Howe* v. *Smith.* (2)

In that case the deposit was paid on a firm contract. But the same principle applies where it is paid in respect of a future contract to be prepared. That appears from the very similar case of *Moeser* v. *Wisker* (3), where the purchaser recovered his deposit expressly and solely on the ground that the vendor had tendered an unreasonable contract. Otherwise it is plain from the judgments that the decision would have been the other way.

Again what is the purchasers' cause of action? It is simply a claim for money had and received to their use. But a deposit of this nature is primarily held to the vendor's use as a guarantee, and it is only on his default that it is held to the purchasers' use. This is virtually implied in *Gosbell* v. *Archer* (4); *Palmer* v. *Temple* (5); and *Collins* v. *Stimson.* (6)

Now here the vendor has made no default. A proper contract has been drawn by the vendor's solicitors, approved by the purchasers' solicitor, and executed by the vendor, who has always been able and willing to complete. There is obviously no failure of consideration.

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(1) [1895] 2 Ch. 744, 747.

(2) 27 Ch. D. 89, 92, 94, 95, 97, 101.

(3) L. R. 6 C. P. 120.

(4) (1835) 2 Ad. & E. 500, 508.

(5) (1839) 9 Ad. & E. 508, 512, 515n., 521.

(6) (1883) 11 Q. B. D. 142, 144.

Lastly this money was voluntarily paid with full knowledge of the contents of the document of July 10, 1922. The purchasers probably thought it constituted a contract. That was a mistake of law, not fact, and they cannot recover: *Thomas* v. *Brown*. (1)

Lionel Cohen in reply. The deposit is part payment of the purchase money: *Ockenden* v. *Henly*. (2) How can there be purchase money until there is a firm contract?

The document of July 10, 1922, was on the face of it conditional on the execution of a future firm contract, and the deposit, though not so expressed, was obviously conditional on the same event. In other words, until there was a firm contract the vendor was by implication to hold the deposit to the use of the purchasers. That event can never happen. The consideration has wholly failed, and the case is completely covered by *Lloyd* v. *Nowell*. (3)

In *Moeser* v. *Wisker* (4) the purchaser recovered his deposit, because the vendor had tendered an unreasonable contract. That was the short and easy ground of the decision. But non constat that he could not also have recovered it on the ground that there was no contract, a more difficult point, which the Court of Common Pleas were fortunately not called on to decide.

Astbury J. [after stating the facts and discussing without deciding the question whether the document of July 10, 1922, constituted a binding contract.] The second question is whether assuming there was no binding contract the purchasers are entitled to recover the 240*l*. deposit, there being no improper conduct or refusal on the part of the vendor, who has throughout been ready and willing to carry out the arrangement contemplated at the time the deposit was paid, and the purchasers being the persons who refused to carry out the arrangement, when a proper contract was tendered. In other words can they recover this sum of 240*l*. voluntarily paid by them with full knowledge of the contents of the document and expressly paid "as deposit and in part payment of the said purchase money"?

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(1) 1 Q. B. D. 714, 721-723.
(2) (1858) E. B. & E. 485, 492.
(3) [1895] 2 Ch. 744, 747.
(4) L. R. 6 C. P. 120.

Now what is the nature of a sum paid by way of deposit and part payment? It is generally paid on the signing of a firm contract. There is however one instance—*Lloyd* v. *Nowell* (1) relied on by the purchasers—in which a sum of 100*l.* was paid "as conditional deposit," the contract itself being conditional on the preparation and completion of a formal contract. The purchaser having repudiated the conditional contract, the vendor sued for specific performance offering to waive the condition. The purchaser counterclaimed for the return of the conditional deposit. Kekewich J., holding that the vendor could not waive the condition, refused specific performance and ordered the return of the deposit, which, as I have already said, was only paid "as conditional deposit."

In *Howe* v. *Smith* (2) there is a quantity of valuable information as to the meaning of a deposit. Cotton L.J. said (3): "Now the claim for this return of the deposit . . . . is essentially a claim at common law. . . . . The contract contains no clause at all as to what is to be done with the deposit if the contract is not performed." Later on, adopting a passage from Sugden's Vendors and Purchasers, 14th ed., p. 40, he said (4): "'Where a purchaser is in default and the seller has not parted with the subject of the contract, it is clear that the purchaser could not recover the deposit; for he cannot, by his own default, acquire a right to rescind the contract.' . . . . Then we have . . . . *Collins* v. *Stimson* (5) in which Pollock B. . . . . says . . . . 'According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.' . . . . In *Ex parte Barrell* (6) where the purchaser had become bankrupt, and the trustee in bankruptcy had disclaimed the contract under

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(1) [1895] 2 Ch. 744, 747.

(2) 27 Ch. D. 89.

(3) 27 Ch. D. 92.

(4) 27 Ch. D. 94.

(5) 11 Q. B. D. 142, 143.

(6) (1875) L. R. 10 Ch. 512, 514.

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which he sought to recover the deposit . . . . James L.J. says . . . . 'The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract, and then says, give me back the deposit. There is no ground for such a claim.' . . . . The deposit . . . . using the words of James L.J., is a guarantee that the contract shall be performed. If the sale goes on . . . . it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to James L.J., he can have no right to recover the deposit. . . . . In order to enable the vendor [to retain the deposit], ... there must be acts on the part of the purchaser . . . . which would make his conduct amount to a repudiation on his part of the contract." Bowen L.J. said (1): "In the present case we have . . . . a description of the manner in which the money is staked or deposited. It is a deposit, and it is to be both a deposit and in the nature of part payment, and there is further a special clause. . . . . We may however pass by that special clause . . . . because . . . . that clause merely fixes the amount which the vendor is to receive in the event of his insisting on his rights under the special clause. We have therefore to consider what in ordinary parlance, and as used in an ordinary contract of sale, is the meaning which business persons would attach to the term 'deposit.' . . . . A deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase. . . . . The purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong." Fry L.J. said (2): "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. . . . . The terms most naturally to be implied appear . . . . to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but . . . . also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

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(1) 27 Ch. D. 97.

(2) 27 Ch. D. 101.

These expressions of opinion were delivered in reference to a deposit on an actual firm contract.

In *Moeser* v. *Wisker* (1) the vendor arranged to sell a tavern to the purchaser for 800*l.* and was paid 80*l.* deposit. He gave the purchaser a receipt stating that he had received the sum of 80*l.* from the purchaser, being the deposit on account of 800*l.*, the purchase money for the Wheat Sheaf Tavern " the contract for which is now being prepared, to be signed by the vendor and purchaser when completed and ready for signature." Three days later the vendor tendered a contract containing unusual and unreasonable terms for a private purchase. On that ground the purchaser refused to sign it, and the vendor resold the property for the same price. It was held that the purchaser was entitled to recover the deposit.

Now in that case the deposit was paid before there was any firm contract. It is plain that the Court of Common Pleas gave judgment for the return of the deposit because the vendor had insisted on the purchaser submitting to unreasonable terms in the transaction, which terms the purchaser was entitled to decline, and consequently, the vendor being in default, the purchaser was entitled to recover his deposit.

One matter that has to be determined on this point is whether money paid as a deposit and in part payment of the purchase money before there is a firm contract is to be treated in the same way as a deposit paid on a firm contract. The most direct authority is *Moeser* v. *Wisker*. (1) It is plain that the Court of Common Pleas thought that the purchaser would not have been entitled to recover his deposit on declining to continue the transaction in respect of which the deposit was paid, if the vendor being able and willing to perform his part of the transaction contemplated at the time of the deposit, had tendered a reasonable contract.

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(1) L. R. 6 C. P. 120.

The result of the authorities may be stated as follows. Where a deposit is paid before there is any firm contract the payer can recover it if the payee insists on something unreasonable in carrying out the transaction. If on the other hand the payee does not insist on unreasonable terms, and the payer when offered all he can reasonably ask for having regard to the transaction contemplated in the memorandum signed at the time of the deposit, refuses without just cause to proceed, he cannot recover the deposit.

In the present case the document of July 10, 1922, contemplated that if and when a proper contract was agreed to the sale should go through. The solicitors as agents of both parties having approved a proper form of contract the vendor signed it and was ready and willing to complete. The purchasers without any default of the vendor simply refused to go on with the transaction. In my opinion they are faced with the same consequences as to the deposit as if there had been a firm contract when it was paid.

In *Thomas* v. *Brown* (1) the purchaser signed a contract which owing to the absence of the vendor's name did not comply with the Statute of Frauds, and subsequently repudiated on that ground. It was held that she could not recover the deposit. This is really a third type of case —namely, deposit paid on an actual contract, but a contract unenforceable owing to the statute. Mellor J. said (2): "She voluntarily paid the 70*l.*, with full knowledge that the vendor's name was not disclosed on the contract, and so far accepted the description ['the vendor'] as sufficient. Under these circumstances, I think she cannot recover back the money." Later on he said (3): "Then there is a second answer. In an action like the present, for money had and received, the plaintiff can only recover money paid without knowledge of the real facts—in ignorance of facts which, if they had been known, would have left the plaintiff

(1) 1 Q. B. D. 714.
(2) 1 Q. B. D. 721.
(3) 1 Q. B. D. 722.

an option whether she would pay or not. . . . . It is unnecessary to allude to the difference between ignorance of the law and ignorance of the facts. Now, is there anything unconscientious in the defendant keeping this money? I can see nothing. The breaking off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question about the Statute of Frauds, and to say, 'Although I can have the contract performed if I please, I repudiate it.' Under these circumstances, I think it would be quite monstrous if the plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim." Quain J. said (1): "I decide this cause on the ground that it is an action by an unwilling vendee against a willing vendor, and that it cannot be said that the consideration has failed so as to entitle the plaintiff to recover. . . . The defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the contract; in short, to give the plaintiff all that was bargained for. Now where, upon a verbal contract for the sale of land, the purchaser pays the deposit and the vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money."

Again, this is really a common law claim for money had and received to the purchasers' use. But the deposit did not become money had and received to the purchasers' use unless and until the vendor made some default in the duties he undertook when that deposit was paid: *Gosbell* v. *Archer* (2); *Palmer* v. *Temple* (3); *Collins* v. *Stimson*. (4)

The purchasers cannot set up any failure of consideration when the vendor has always been ready and willing to perform the duties contemplated by the document of July 10, 1922, in respect of which the deposit was paid. As soon as the terms of the proper formal contract were approved by the

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(1) 1 Q. B. D. 723.

(2) 2 Ad. & E. 500, 508.

(3) 9 Ad. & E. 508, 512, 515n., 521.

(4) 11 Q. B. D. 142, 144.

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solicitors, it only remained for the vendor to execute it as he did and be ready and willing to carry out the transaction, as he was, so that on his part there has been no default.

Lastly, the money was not paid under any mistake of fact, so that the purchasers cannot recover on that ground.

Assuming, therefore, that the document of July 10, 1922, was only a conditional agreement, the purchasers have made out no case in law for the recovery of the deposit. There will be no declaration, but the action will be dismissed with costs.

Solicitors: *Francis T. Jones; Barfield & Barfield.*

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In re COAL MINES CONTROL AGREEMENT (CONFIRMATION) ACT, 1918.

LAMBTON AND HETTON COLLIERIES, LIMITED *v.* THE SECRETARY FOR THE MINES DEPARTMENT OF THE BOARD OF TRADE AND THE ATTORNEY-GENERAL.

[1922. C. 323.]

Statute—Repeal—Saving Clause—Right or Liability accrued—"Coal mines excess payments"—Coal Mines Control—Profits Standard—Substituted Standard—Coal Mines Control Agreement (Confirmation) Act, 1918 (7 *&* 8 *Geo.* 5, *c.* 56), *Schedule, clauses* 3, 8—*Coal Mines (Emergency) Act,* 1920 (10 *Geo.* 5, *c.* 4), *s.* 9, *Sch. II., Part. I., para.* 1.

By clause 3 of the control agreement contained in the Schedule to the Coal Mines Control Agreement (Confirmation) Act, 1918, it was provided that, if in any "accounting period" the coal company's profits exceed the "profits standard" to the extent therein specified, a certain portion of the excess should be paid to the Commissioners of Inland Revenue as "coal mines excess payments"; and by clause 1 of the agreement the expressions "accounting period" and "profits standard" were given the same meanings as were given to them in the Finance (No. 2) Act, 1915.

By clause 8 of the agreement it was provided that, if at any time it appeared to the controller (whose office, duties and powers after the Mining Industry Act, 1920, became vested in the Secretary for Mines) either on his own motion or on the motion of the owner of the coal mine that there was no "profits standard," or that the profits

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standard as ascertained under the Finance (No. 2) Act, 1915, could not fairly be applied, the controller should fix a substitute for the profits standard.

The Act of 1918 was repealed and the control agreement was determined by the Coal Mines (Emergency) Act, 1920, s. 9, as from April 1, 1919. By Part I., para. 1, of Sch. II. to the repealing Act, the determination of the agreement was not to affect "any right or liability which may have accrued before the date of the determination thereof."

A coal company, bound by the control agreement, made the required returns in respect of certain accounting periods before and up to June 30, 1919, for the purpose of having the amount of "coal mines excess payments" due to the Inland Revenue Commissioners ascertained under clause 3 of the agreement; and the question arose, whether, notwithstanding that the amount due was still under consideration and not yet ascertained, the Secretary for Mines was bound, after the determination of the agreement, upon the application of the company to proceed under clause 8 to fix a substituted standard:—

Held, that the right of the Inland Revenue Commissioners to be paid and the liability of the coal company to pay the excess payments under clause 3 of the agreement was a right and was a liability which accrued before the determination of the agreement, and that notwithstanding the determination thereof as from April 1, 1919, the provisions of clause 8 of the agreement were an integral part of the machinery for ascertaining the measure of that accrued right and corresponding liability; and that so long as the company remained liable to pay an unascertained balance under the agreement, all the clauses thereof relating to the measure of that liability, including clause 8, necessarily continued in force.

Decision of P. O. Lawrence J. affirmed.

Abbott v. *Minister for Lands* [1895] A. C. 425 distinguished.

THE Lambton and Hetton Collieries, Ld., which was incorporated under the Companies Acts with the object of working and carrying on coal mines, became bound by the control agreement contained in the Schedule to the Coal Mines Control Agreement (Confirmation) Act, 1918.

By clause 3 of that agreement it was provided that, if in any "accounting period," the coal company's profits should exceed the "profits standard" to the extent therein specified, a certain portion of the excess should be paid to the Commissioners of Inland Revenue as "coal mines excess payments"; and by clause 1 of the agreement the expressions "accounting period" and the "profits standard" were given the same meanings as were given to them by the Finance (No. 2) Act, 1915.

By clause 8 of the agreement it was provided that, if at any time it appeared to the controller (whose office, duties and powers after the Mining Industry Act, 1920, became vested in the defendant, the Secretary for Mines), either on his own motion or on the motion of the owner of the coal mine that there was no "profits standard," or that the profits standard as ascertained under the Finance (No. 2) Act, 1915, could not fairly be applied, the Controller should fix a substitute for the profits standard.

The Act of 1918 was repealed and the agreement was determined by the Coal Mines (Emergency) Act, 1920, s. 9, as from April 1, 1919, but by Sch. II., Part I., para. 1, of that Act, it was enacted that "the determination of the agreement confirmed by the Coal Mines Control Agreement (Confirmation) Act, 1918, shall not affect any right or liability which may have accrued before the date of the determination thereof." The company in compliance with the requirements of the controller made returns showing its output and other particulars in respect of several accounting periods during control, prior and up to June 30, 1919, for the purpose of ascertaining the balance of profits due from the company to the Commissioners of Inland Revenue under clause 3 of the agreement. The amount of that balance as the result of those returns was still under consideration and undetermined in February, 1921, when the company applied to have a standard fixed by the Secretary for Mines in accordance with the provisions of clause 8 of the agreement in substitution for the profits standard. But on or about July 15, 1921, the company was informed by the Secretary for Mines that in view of the repeal of the Act of 1918 by the Coal Mines (Emergency) Act, 1920, retrospectively as from April 1, 1919, he was not then empowered to entertain the application of the company.

Accordingly, a summons was taken out by the company to which the Secretary for Mines and the Attorney-General were made defendants, raising the question whether, notwithstanding the provisions of s. 9 of the Coal Mines (Emergency) Act, 1920, the defendant the Secretary for Mines was still bound in the events specified in clause 8 of the agreement to fix, as a substitute for the profits standard, a sum to be ascertained in the manner provided by that clause.

The summons was heard before P. O. Lawrence J. on October 19, 20, 1922.

Tomlin K.C. and *F. K. Archer*, for the plaintiff company. The company has, under clause 8 of the agreement, a right to have a substitute fixed by the controller in lieu of the "profits standard." Although the agreement was determined as from April 1, 1919, by virtue of s. 9, of the repealing Act, 1920, yet by para. 1 of Part I. of Sch. II. to that Act, the rights and liabilities then accrued were saved. The returns relating to several accounting periods before that date were then under consideration, and the amount of the balance of profits due to the Commissioners was undetermined. The right of the Commissioners to be paid and the liability of the company to pay the balance when ascertained under clause 3 of the agreement were respectively a right and a liability which had accrued before the determination of the agreement within the meaning of para. 1 of Part I. of Sch. II. to the Act of 1920. The duty of the controller on the application of the company to fix a substituted standard under the conditions mentioned in clause 8 is an integral part of the machinery for ascertaining the ultimate liability of the company under clause 3, and, consequently, continues binding on him.

Sir Ernest Pollock A.-G. and *Dighton Pollock* for the defendants. The duty of the controller to fix a substituted standard under clause 8 does not arise unless and until a motion has been made. The right to move is a right of the owner (the company) or the controller. The right in this case of the company to have a substituted standard fixed did not exist until the application was made by the company; and as it was not made until after April 1, 1919, when the agreement ceased to have effect, it was not a right which could be said to have accrued before the determination of the agreement, within the meaning of the saving clause, clause 1 of Part I. of Sch. II. to the repealing Act of 1920. The mere right to take advantage of a repealed statute is not

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a right "accrued" within the meaning of the saving clause. It is fallacious to say that the company had a right under clause 8 of the agreement before the repeal. The contention of the company, if successful, would enable the company to take advantage of the right for an indefinite length of time after the repealing Act. The right, which was not asserted until after the repeal, was not an "accrued right" and therefore not within the saving clause: *Abbott* v. *Minister for Lands.* (1) The right was not part of the machinery for ascertaining the balance due to the Commissioners. It was an alternative right which the company possessed, in a proper case, but which could not come into existence until a motion was made. It was too late to move after the determination of the agreement.

P. O. LAWRENCE J. The solution of the question raised on this application, in my opinion, depends upon what is the effect of s. 9 of the Coal Mines (Emergency) Act, 1920, and para. 1 of Part I. of Sch. II. of that Act, upon clause 8 (1.) of the Coal Mines Control Agreement scheduled to the Coal Mines Control Agreement (Confirmation) Act, 1918.

It is not disputed that, notwithstanding the repeal of the Confirmation Act, and the determination of the control agreement, the plaintiffs, as owners of an undertaking within the meaning of the control agreement, are liable to pay to the Commissioners of Inland Revenue any balance of the profits which may be ascertained to be still due from them to the Commissioners under the provisions of the control agreement in respect of all accounting periods prior to April 1, 1919, the date as from which the control agreement is deemed to have ceased to have effect. Notwithstanding this, however, the Attorney-General contends that, owing to the provisions of the repealing Act, the controller has no longer any power to exercise the duty imposed upon him (for the purpose of arriving at the amount which the plaintiffs may have to pay in respect of the accounting periods prior to the determination of the agreement) of fixing a substituted standard under clause 8 (1.)

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(1) [1895] A. C. 425, 431.

of the agreement, although it may appear to the controller that there is no profits standard or that the profits standard as ascertained under the Finance (No. 2) Act of 1915, cannot fairly be applied. I gather that there has been considerable delay on the part of the plaintiffs in making their returns, and that, in fact, no claim for the fixing of a substituted standard was made until nearly a year after the passing of the repealing Act. But I have nothing to do with that in this case. All that I am asked to decide is whether the controller still has power to act under clause 8 (1.) of the control agreement after the date of the repealing Act in cases where the balance of profits to be paid to the Commissioners under clause 3 of the agreement has still to be settled. It must be clearly understood that my decision upon the point does not involve a decision in this case or in any other case as to the particular merits of those cases, and particularly as to whether the plaintiffs can avail themselves of clause 8 (1.), after a payment has been already made on the basis of a profits standard.

The contentions of the Attorney-General, I confess, strike me as somewhat startling. Admittedly all the rest of the provisions of the control agreement, so far as they relate to the ascertainment of the sum which the plaintiffs have to pay and so far as they relate to the liability of the plaintiffs to make the payment, must be deemed to remain in force for the purpose of charging the plaintiffs with those payments; yet, it is said that the provisions of clause 8 (1.) are no longer operative, although such provisions, if acted upon, may have a vital bearing on the amount which may be found to be due from the plaintiffs to the Commissioners of Inland Revenue. In my judgment, so long as the plaintiffs are liable to pay any balance of profits under the provisions of the agreement, all the clauses of the agreement which have any bearing on the measure of that liability, including clause 8 (1.), necessarily remain in force. As I understand the argument of the Attorney-General, it is that the duty which is imposed upon the controller by clause 8 (1.) to fix a substituted standard, in the events therein mentioned, is neither a right nor a

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liability which "may have accrued before the date of the determination of the agreement," within the meaning of para. 1, Part I., of Sch. II. to the Coal Mines (Emergency) Act, 1920, and therefore no longer exists; and, further, that the implied liberty given under clause 8 (1.) of the control agreement to the owner to move the controller to inquire into the facts in order to see whether the events upon which he is bound to act have, in fact, happened, was not exercised before the determination of the agreement, and therefore cannot now be exercised. In my opinion, that contention is based upon an entire fallacy. On the facts of this case the right which has accrued before the determination of the agreement is the right of the Commissioners to be paid by the plaintiffs a certain balance of the plaintiffs' profits in respect of an accounting period prior to April 1, 1919. Further, the liability which has accrued before the date of the determination of the agreement is the liability of the plaintiffs to pay such balance to the Commissioners. For the purpose of ascertaining the true balance payable, the agreement, amongst other things, imposes a duty upon the controller, in certain events, to fix a substituted standard, and impliedly permits the owner to set the controller in motion for that purpose. In my opinion, the duty so imposed upon the controller to fix a substituted standard is an integral part of the machinery for ascertaining the amount of profits to be paid in order to satisfy the right and discharge the liability which had accrued before the determination of the agreement. I am clearly of opinion that that duty adheres to the controller so long as the right or liability, which has accrued under the Act, is sought to be enforced by either party—that is to say, by either the Commissioners or by the persons who have to pay—namely, the owners. Further, in my opinion, *Abbott* v. *Minister for Lands* (1) cited by the Attorney-General is entirely distinguishable from the present case, and has no bearing upon the question which I have to decide. The decision in that case turns entirely upon the effect of certain provisions contained in several Australian Acts dealing with the alienation of Crown lands, and it was there held that a mere right, which in that case was a right to purchase a limited amount of adjoining land without the obligation to build a residence, existing at the date when the Act which conferred the right was repealed, was not a right accrued within the meaning of the usual saving clause. I may point out that in the judgment of the Privy Council it is shown that, if the decision had been otherwise, the right in that case would have continued indefinitely, and the repeal would have been nugatory, so far as that right and all other advantages conferred by the repealing Act were concerned. The Attorney-General, however, has said that the real grounds of that decision were founded on a canon of construction which laid down, as I understand it, that the words which are to be usually found in saving clauses of this kind, and in the case under consideration, contained in the words "obligation incurred or imposed" in conjunction with the words "right accrued," do not cover a right which has not been exercised or set in motion before the repeal of the Act. In my judgment the case does not decide anything of the kind. The case was decided, as I have pointed out, on the special construction of those Acts of Parliament. In the present case, as I have endeavoured to explain, the "right accrued" is the right to be paid the balance of the profits, and clause 8 (1.) is not a mere right within the meaning of *Abbott* v. *Minister for Lands* (1), but is merely part of the machinery for ascertaining the measure of the right which has so accrued. I therefore propose to make the following declaration: that, notwithstanding the provisions contained in s. 9 of the Coal Mines (Emergency) Act, 1920, upon the true construction of the control agreement, if it shall yet appear to the Board of Trade on the motion of the plaintiffs that there is no profits standard or that the profits standard as ascertained under the Finance (No. 2) Act, 1915, cannot fairly be applied within the meaning of the said agreement, the Board of Trade is still bound (under clause 8 of the said agreement and Part I. of Sch. II.

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(1) [1895] A. C. 425.

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of the Coal Mines (Emergency) Act, 1920, or otherwise) to fix as a substitute for the profits standard a sum to be ascertained as in the said agreement for that case provided, unless by reason of some event or circumstance other than the passing of the last-mentioned Act, the plaintiffs have become disentitled to have any sum fixed as such substitute as aforesaid.

H. C. H.

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The defendants appealed. The appeal was heard on March 7, 1923.

Sir E. Pollock K.C. and *Dighton Pollock* for the appellants substantially repeated the arguments used by them in the Court below.

Tomlin K.C. and *F. K. Archer K.C.* for the respondents were not called upon to argue.

LORD STERNDALE M.R. I think this appeal fails. It is no doubt an important question. Shortly stated it is whether any part, and if so how much of the agreement relating to the compensation to be paid in respect of the control of coal mines, and other matters arising out of control, remains in existence and in force. The particular question is whether clause 8 of the agreement remains in force—that is to say, whether the Secretary for Mines still has power to fix what is there called the special standard. By clause 3 of the agreement the owner of the undertaking, that is to say, in this case, the owner of a mine, is limited to the amount of excess profits which he may retain, and is under liability to pay over the balance to the Commissioners of Inland Revenue. Excess profits have to be ascertained by reference to the actual profits having regard to a certain standard of profits, and by the agreement the percentage standard, which was applicable in ordinary circumstances, is excluded. By this agreement the profits standard prima facie remains. But the agreement contains two other standards, one of which is mentioned in the proviso to clause 3, and that is the special standard. The proviso enacts that if the owner of the undertaking proves that the special standard has been ascertained and certain other elements are satisfied, then a certain portion of the prima facie excess profits, if I may call them so, under the first part of clause 3 shall be remitted or, if they have been paid, shall be refunded. By clause 10 another standard, called a guaranteed standard, is established under certain conditions which I need not mention. The excess profits therefore which the owner has to pay may be ascertained by reference to one or other of those standards, according as the circumstances of the case, and in some cases the controller, makes one or other standard applicable.

That agreement was determined by the Coal Mines (Emergency) Act, 1920. Sect. 9 of that Act provides: "Subject to the provisions of Part I. of the Second Schedule to this Act the agreement confirmed by the Coal Mines Control Agreement (Confirmation) Act, 1918, shall cease to have effect, and shall be deemed to have ceased to have had effect as from the first day of April, 1919, and that Act shall be repealed as from the same date: Provided that the provisions of the said agreement relating to the closing of mines, information and accounts, apportionments, and secrecy, as set out and modified in Part II. of the Second Schedule to this Act shall have effect as if enacted in this Act." Turning to the provisions of Part I. of Sch. II. the first is the only one, I think, to which I need refer. Para. 1 provides: "The determination of the agreement confirmed by the Coal Mines Control Agreement (Confirmation) Act, 1918, shall not affect any right or liability which may have accrued before the date of the determination thereof." It is common ground, at any rate it is part of the argument for the Crown, and I do not think it is contested, that the result of that is to keep alive clause 3 of the agreement, because it is under that clause that the liability to pay arises, and, therefore, the liability to pay on the part of the mineowner, and the right to receive on the part of the controller, is not affected by the determination of the agreement. The first thing that occurs to me on that is that you cannot say that part of clause 3 is kept

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alive and the other part is left out—that is to say, you cannot determine what the liability is until you have ascertained the standard which is to be applied in order to fix the liability, and if you are going to ascertain that under clause 3 it must be ascertained under the whole of clause 3; and there is no justification, in my opinion, for cutting out the special standard which is introduced by the proviso. But I go further and agree with P. O. Lawrence J. when he says that "so long as the plaintiffs are liable to pay any balance of profits under the provisions of the agreement, all the clauses of the agreement which have any bearing on the measure of that liability, including clause 8 (1.), necessarily remain in force." It seems to me it must be so. If the agreement is kept alive as to the liability of the mineowner to pay these "excess payments" it must be kept alive, in my opinion, in all its provisions which are necessary for the ascertainment of the amount of that liability, unless it be expressly stated (as it is not) that some of the liabilities under the section are to remain in force and others are to be repealed. That is not so; the determination has no effect upon the liability of the mineowner, and, therefore, it cannot, as far as I can see, have any effect upon the provisions which are, in effect, machinery for the purpose of ascertaining that liability. On that ground I do not think it is necessary to consider the effect of *Abbott* v. *Minister for Lands* (1), because I do not think it is necessary to consider whether the right which is given by clause 8 (1.) is a right which has accrued, or whether it is not a right which has accrued, and is merely a right which might accrue if the mineowner were to take certain steps. I think the determination of the case rests upon a wider ground, and that is the ground that I have already expressed, that if the sub-section is kept alive as to the liability of the mineowner, it must be kept alive also as to the ascertainment of the amount of liability.

I think the decision of P. O. Lawrence J. was right and the appeal must be dismissed with costs.

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(1) [1895] A. C. 425.

WARRINGTON L.J. The determination of the Coal Mines Control Agreement (Confirmation) Act, 1918, by the Coal Mines (Emergency) Act of 1920, as from April 1, 1919, is subject to this provision, that it shall not affect any right or liability which may have accrued before the determination thereof. Now under the Coal Mines Control Agreement the owner of a coal mine has to make to the Commissioners of Inland Revenue certain payments called "controlled mine excess payments." For the purposes of ascertaining the amount of such payments there was provided by the agreement in certain cases a standard called a special standard as a substitute for the normal standard of profits established by the Finance (No. 2) Act, 1915; and provision was made by s. 8 (1.) for the ascertaining in the appropriate cases of the special standard. The machinery therefore for ascertaining the amount of the liability accruing under the provisions of that agreement includes the provisions in clause 8 (1.). It is part of the case of the Attorney-General that the liability of the coalowner as regards accounting periods prior to April 1, 1919, continues to exist, but he insists that if it is now to be ascertained it must be ascertained by reference only to the profits standard without considering the special standard provided for by the Act. The effect of that contention seems to me to be this, that a part, and a part only, of that portion of the agreement which is devoted to the imposing and ascertaining of the liability remains in effect, and part of it has gone. It seems to me that that is quite impossible. I think I cannot better state my own view than by reading a short passage from the judgment of the learned judge: [His Lordship read the passage set out in the judgment of the Master of the Rolls and continued:] With regard to *Abbott* v. *Minister for Lands* (1) that case seems to me to have no bearing upon the present question, which turns entirely upon the proper construction and effect of the restriction imposed by the Coal Mines (Emergency) Act of 1920, on the effect of the repeal of the Coal Mines

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(1) [1895] A. C. 425.

Control Agreement and its confirming Act. In my opinion, therefore, the appeal fails and must be dismissed.

ATKIN L.J. I agree. It appears to me that this is a reasonably plain case, and I agree with the whole of the judgment which has been delivered by P. O. Lawrence J. It appears to me that applying the words of Sch. II. of the Coal Mines (Emergency) Act, 1920, any right or liability which may have accrued under clause 1, Part I., of Sch. II., is a liability under the whole agreement, and when clause 2 speaks of "any sums payable under the said agreement," and provides that they are to be paid into the account established under the Coal Mines Control Agreement (Confirmation) Act, 1918, it means sums payable under the whole agreement, and not under one clause in it. If in fact there are alternative modes of ascertaining a sum payable under an agreement, then those alternative modes of ascertaining that sum must be maintained. The opposite contention seems to lead to very odd results. The agreement provides for the payment of what are called coal mines excess payments which are to be ascertained, roughly speaking, as being an excess over the amount of excess profits which was payable under the Finance (No. 2) Act, 1915, in respect of excess profits duty. It is only the excess over the amount of the excess profits tax as ascertained upon one standard—namely, the standard of profits, the percentage standard under the Excess Profits Act being specially eliminated in the Act dealing with this agreement. Clause 8 (1.) provides that where there is no profits standard, or where the profits standard is unfair, there is still to be a liability upon the coalowner, but, according to the contention which has been put before us, after the Act of 1920, in respect of an accounting period before the Act of 1920, where the profits standard was impossible the coalowner was relieved of liability altogether, and where the profits standard was unfair the coalowner was obliged to make an unfair statement and the Board of Trade was entitled to demand from him an unfair statement. That does not seem to me to be the true construction of the Act of Parliament,

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I agree that it is not necessary to consider the question as to the meaning of a "right accrued." I think it is sufficient to say that where the suggested right is a right which directly qualifies the liability which is sought to be enforced, that right to qualify an accrued liability is to my mind quite plainly an accrued right. *Abbott* v. *Minister for Lands* (1) appears to me to be a case of an entirely different kind, and I think it was properly distinguished by the learned judge. I agree that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne; Solicitor to Board of Trade.*

(1) [1895] A. C. 425.

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